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SUPREME COURT OF THE UNITED STATES.

No. 191.

BASIL F. WARNOCK, ADMINISTRATOR OF HENRY L. CROSSER, DECEASED, PLAINTIFF IN ERROR.

VS.

GEORGE DAVIS, WILLIAM HUGHES, ALBERT McFARLAND, JEFFERSON L. WATKINS, EDWARD N. HOPE, MELANCTHON T. BURKE, AUGUSTINE O. WALKER, FELIX G. BURKE, AND T. M. LYNN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED MAY 19, 1879.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held in the court rooms, at the city of Cincinnati, on the first Tuesday of October, being the first day of that month, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and third. Present, the honorable John Baxter and the honorable Philip B. Swing, judges.

Among the proceedings had were the following, to wit:

BASIL F. WARNOCK, ADMINISTRATOR, &c.,
vs.
GEORGE DAVIS ET AL. } 2520.

Be it remembered that heretofore, to wit, on the 17th day of July, in the year of our Lord one thousand eight hundred and seventy-seven, came the plaintiff, Basil F. Warnock, and, by his attorneys, Donham and Foraker, filed in the clerk's office of the court aforesaid his certain petition in said cause, clothed in the words and figures following, to wit:

2 *Petition.*

United States circuit court southern district of Ohio.

BASIL F. WARNOCK, A CITIZEN OF THE STATE of Kentucky and administrator of the estate of Henry L. Crosser, late of Greenup County, State of Kentucky, deceased, plaintiff,
vs.
GEORGE DAVIS, WILLIAM HUGHES, ALBERT McFarland, Jefferson L. Watkins, Edward N. Hope, and Augustine O. Walker, citizens of the State of Ohio, and partners under the firm name of the Scioto Trust Association, of Portsmouth, Ohio, defendants.

The plaintiff says he is a citizen of the State of Kentucky, and the duly appointed and authorized administrator of the estate of Henry L. Crosser, late of Greenup Co., Kentucky, deceased. That the defendants are all citizens of the State of Ohio, residing within the jurisdiction of this court, and partners under the firm name of the Scioto Trust Association of Portsmouth, Ohio, and have been such partners since prior to the 22d day of February, A. D. 1872. That on said 22d
3 day of February, A. D. 1872, the Protection Life Insurance Company of Chicago, Illinois, a corporation organized under the laws of the State of Illinois, and engaged in a general life-insurance business in said State and throughout the United States, upon application by him duly made issued its certain policy, No. 3247, on the life of Henry L. Crosser, and thereby insured the same in the sum of five thousand dollars, payable at his death to his estate. That he faithfully complied with all the requirements and stipulations of said policy on his part until the 11th day of September, A. D. 1873, when he died, leaving said policy in full force and effect.

That after said policy had been issued to said Henry L. Crosser, and

prior to his death, the exact date not known to this plaintiff, the defendant induced him to transfer and assign said policy to them in trust. That said policy and said assignment thereof are not in the possession or under the control of this plaintiff, and he cannot therefore give a copy of the same, but he avers that said defendants never had any insurable interest in the life of said Henry L. Crosser, and, prior to said assignment, he was never indebted to them in any sum whatever, nor did he afterward become indebted to them in any sum except
4 a few dollars advanced by them for him to said company on account of said policy, to keep the same alive and in force, the amount of which is not known to this plaintiff, but according to his best information and belief was about twenty dollars.

That after the death of said Henry L. Crosser, to wit, on the day of May, A. D. 1874, the said defendants, as the assignees of said policy under said assignment, collected from said company the full amount of said policy, viz, five thousand dollars, in payment and satisfaction thereof. That out of said sum so collected by them defendants were entitled to retain only the amount advanced by them to said company for said Henry L. Crosser to keep said policy alive and in force, as stated, said sum being as above stated according to the best information and belief of this plaintiff twenty dollars; that the balance of said sum should have been paid over and accounted for to the administrator of the estate of said Henry L. Crosser, but that, notwithstanding the premises, they have refused and still refuse to so account for the same or any part thereof, except the sum of four hundred and eighty dollars.

That there is now due and payable from said defendants to this
5 plaintiff, as said administrator, on account of the money so collected by them as aforesaid from said company on account of said policy, the sum of four thousand and five hundred dollars, with interest thereon from the day of May, A. D. 1874, for which by reason of the premises, together with costs of suit, this plaintiff, as administrator as aforesaid, prays judgment against said defendants, and for all other relief to which in law or equity he may be entitled.

DONHAM AND FORAKER,
Attorneys for Pl'ff.

UNITED STATES OF AMERICA,
State of Kentucky, Greenup County, ss:

Basil F. Warnock, being first duly sworn, says the facts stated and the allegations made in his foregoing petition as administrator are as he believes, true.

BASIL F. WARNOCK,
Administrator.

Sworn to before and signed in my presence this 10th day of July, A. D. 1877.

[SEAL.]

JEREMIAH DAVIDSON,
Notary Public in and for Greenup County,
State of Kentucky.

6 *Precipe.*

United States circuit court, southern district of Ohio.

BASIL F. WARNOCK, ADMINISTRATOR, &c.,
vs.
GEORGE DAVIS AND OTHERS.

To the clerk:

Issue summons on the petition in the above case. Suit for money only. Amount claimed, $4,500.00, with interest from the day of , A. D. 1874.

DONHAM & FORAKER,
Attorneys for Pl'ff.

I hereby acknowledge myself security for costs in this action.

C. M. OVERMAN.

JULY , 1877.

And afterwards, to wit, on the seventeenth day of July, in the year of our Lord one thousand eight hundred and seventy-seven, there were issued out of the clerk's office of the court aforesaid two writs of summons, directed to the marshal of said district against said defendants, which said writs are clothed in the words and figures following, to wit: 7

Summons.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon George Davis, William Hughes, Albert McFarland, Jefferson L. Watkins, Edward N. Hope, and Augustine O. Walker, Portsmouth, Ohio, citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the fifth Tuesday in the month of July, 1877, to answer unto Basil F. Warnock, administrator of the estate of Henry L. Crosser, late of Greenup County, State of Kentucky, citizen of and resident in the State of Kentucky, in an action for money only, and have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the United States, this 17th day of July, A. D. 1877, and in the 102 year of the Independence of the United States of America.

Attest:

{ SOEUTHERN DIST. OF OHIO, SEAL U. S. CIR. CT. }

THOS. AMBROSE,
Clerk.

8 And afterwards, to wit, on the 26th day of July, 1877, came the marshal of said district, to whom the said writs were in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

Marshal's return.

Received this writ at Cincinnati on the 17th day of July, 1877, and served the same in Scioto County, Ohio, as follows, to wit: Served personally on William Hughes and Jefferson L. Watkins on Saturday, July 21st, at 11 a. m., and on Albert McFarland on Saturday, July 21st, at 11½ a. m.; on Edward N. Hope on Monday, July 23d, at 10 a. m., and George Davis on Monday, July 23d, at 10 a. m.; Augustine O. Walker not found.

W. R. THRALL,
U. S. Marshal.
THOMAS. T. YEAGER,
Dep't U. S. Marshal, S. D. O.

And afterwards, to wit, on the 30th day of July, A. D. 1877, came the said marshal, to whom the said second writ was in form aforesaid directed, and returned into the clerk's office of the said court, with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

9 *2d marshal's return.*

Received this writ at Cincinnati, Ohio, on the 26th day of July, A. D. 1877, and served the within-named Augustine O. Walker, in Pickaway County, as follows: By delivering him in person a true copy of this writ, with all the endorsements thereon, on the 27th day of July, A. D. 1877, at 6 o'clock p. m.

WILLIAM R. THRALL,
U. S. Marshal,
By B. H. BOSTWICK,
Deputy U. S. Marshal, S. D. O.

And afterwards, to wit, on the 10th day of September, in the year of our Lord one thousand eight hundred and seventy-seven, came the defendants, and, by their counsel, W. A. Hutchins and Thompson and Turley, filed in the clerk's office of the court aforesaid their certain answer in said cause, clothed in the words and figures following, to wit:

10 *Answer.*

United States circuit court southern district of Ohio.

BASIL F. WARNOCK, A CITIZEN OF THE STATE of Kentucky, and administrator of the estate of Henry L. Crosser, late of Greenup County, State of Kentucky, deceased, plaintiff,
vs.
GEORGE DAVIS, WILLIAM HUGHES, ALBERT McFarland, Jefferson L. Watkins, Edward N. Hope, and Augustus O. Walker, citizens of the State of Ohio, and partners under the firm name of the Scioto Trust Association, of Portsmouth, O., defendants.
} #2520.

The defendants say:

At the dates and during the times mentioned in the petition the said Scioto Trust Association, of Portsmouth, Ohio, was composed of these defendants and the following persons, viz, Melancthon T. Burke, David B. Colton, Felix G. Buske, and Andrew B. Jones, and Trustem M.
Lynn, of Portsmouth, Scioto County, Ohio, Henry E. Hess, of
11 Scranton, Pennsylvania, Charles J. Hess, of Washington, D. C.,
and John R. Fender, of Syracuse, New York, and is now composed of the following persons, viz, Melanthon T. Burke, Felix G. Burke, Edward N. Hope, Trustem M. Lynn, Jefferson L. Watkins, Albert McFarland, Augustus O. Walker, William Hughes, and Frank C. Kricker, all residing within said district, and Orlando H. Ross, residing at Washington, D. C.; that said Henry E. Hess, Chas. J. Hess, John R. Fender, Melancthon T. Burke, Trustem M. Lynn, Felix G. Burke, Orlando H. Ross, and Frank C. Kricker, all of whom are still living, and who reside as aforesaid, are jointly liable with these defend-

ants upon any cause of action which the plaintiff may have against said firm, growing out of the transactions mentioned in the petition.

W. A. HUTCHINS AND
THOMPSON & TURLEY,
Att'ys for Defendants.

UNITED STATES OF AMERICA,
State of , *Scioto County, ss:*

Jefferson L. Watkins, being sworn, says the facts stated and allegations in the foregoing answer of himself and others are, as he believes, true.

JEFF. L. WATKINS.

12 Signed in my presence and sworn to before me this 7th day of September, A. D. 1877.

[SEAL.] C. McFARLAND,
Notary Public, Scioto County, O.

And afterwards, to wit, on the 10th day of September, in the year of our Lord one thousand eight hundred and seventy-seven, came the plaintiff aforesaid, and by his said attorneys, Donham and Foraker, filed in the clerk's office of the court aforesaid his certain "amended petition" in said cause, clothed in the words and figures following, to wit:

United States circuit court southern district of Ohio.

BASIL F. WARNOCK, A CITIZEN OF THE STATE of Kentucky, and administrator of the estate of Henry L. Crosser, deceased, plaintiff,
vs.
GEORGE DAVIS AND OTHERS, DEFENDANTS.
} Amended petition.

13 *Amended petition.*

Plaintiff for his amended petition herein now comes and says that he here adopts and reaffirms all that is said and contained in his petition herein as a part hereof, and says further, in addition thereto, that at the date and during the time of the transactions in the petition set forth and complained of, Melancthon Burke, David B. Cotton, Felix G. Burke, Andrew B. Jones, and Trustum M. Lynn were all members of said partnership, to wit, the Scioto Trust Association, and were then and still are residing at this district, within the jurisdiction of this court, except said Andrew B. Jones, who is now deceased; that Henry E. Hess, Charles J. Hess, and John R. Fender were also at said date members of said partnership, but that all of them are non-residents of this district, and beyond the jurisdiction of this court; that all the defendants mentioned in the original petition herein, to wit, George Davis, William Hughes, Albert McFarland, Jefferson L. Watkins, Edward N. Hope, and Augustus O. Walker, together with the said Melancthon Burke, David B. Cotton, Felix G. Burke, Trustem M. Lynn, Henry E. Hess, Chas. J. Hess, and John R. Fender, are jointly and severally liable, as the surviving partners of the said Andrew B. Jones, 14 to this plaintiff for said sum of forty-five hundred dollars, so collected and withheld by them as in the petition stated, together with interest and costs of suit herein expended, as in said petition set forth, and that all have alike refused to account therefor or for any part thereof; wherefore said plaintiff prays that all said parties may be made defendants herein; that process of summons may issue against them, and that he may have judgment against all, as prayed for in his original petition.

By DONHAM AND FORAKER,
His Attorneys.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

J. B. Foraker says on oath that he is one of the attorneys for the plaintiff, duly authorized in the premises; that the plaintiff is a non-resident of said district, residing and being in the State of Kentucky; and that he believes the facts stated and the allegations made in this plaintiff's amended petition are true.

J. B. FORAKER.

Sworn to before me and signed in my presence this 10th day of September, 1877.

[SEAL.] PHILIP ROETTINGER, JR.,
N. P., Hamilton Co., O.

15 *Precipe.*

United States circuit court, southern district of Ohio.

BASIL F. WARNOCK, ADMINISTRATOR, &C., pl'ff,
vs.
GEORGE DAVIS ET AL., DEF'T.

To the clerk:

Issue summons on foregoing amended petition for George Davis, William Hughes, Albert McFarland, Jefferson L. Watkins, Edward N. Hope, Augustine O. Walker, Melancthon T. Burke, David B. Cotton, Felix G. Burke, Trustem M. Lynn, Henry E. Hess, Charles J. Hess, and John R. Fender.

Suit for money only.

Amount claimed, $4,500.00, with interest from the day of , A. D. 1874.

DONHAM AND FORAKER,
Attorneys for Pl'ff.

All of said parties live at Portsmouth, Ohio, except Henry E. Hess, Charles J. Hess, and John R. Fender, who are non-residents of Ohio.

16 And afterwards, to wit, on the eleventh day of September, in the year of our Lord one thousand eight hundred and seventy-seven, there were issued out of the clerk's office of the said court two certain writs of summons against said defendants and directed to the marshal of said district, which said writs are clothed in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon George Davis, William

Hughes, Albert M. McFarland, Jefferson L. Watkins, Edward N. Hope, Melancthon T. Burke, David B. Cotton, Felix G. Burke, Trustam M. Lynn, all of Portsmouth, Scioto County, Ohio, citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the 4th Tuesday in the month of September,
1877, to answer unto an amended petition of Basil F. Warnock,
17 administrator of the estate of Henry L. Crosser, deceased, citizen
of and resident in the State of Kentucky, in an action for money only; amount claimed, $4,500.00, with interest; and have you then and there this writ.

Witness, the honorable M. R. Waite, Chief Justice of the United States, this 11th day of September, A. D. 1877, and in the 102d year of the Independence of the United States of America.

Attest:

[SEAL.] THOS. AMBROSE, *Clerk*.

And afterwards, to wit, on the eighteenth day of September, in the year of our Lord one thousand eight hundred and seventy-seven, came the said marshal, to whom the said first writ was in form aforesaid directed, and returned the same into the clerk's office of said court with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

Marshal's return, 1st writ.

Received this writ at Cincinnati on the 11th day of September, 1877, and served the same in Pickaway County, Ohio, as follows, to wit, by
leaving a true copy thereof at the usual place of residence of the
18 within-named Augustus O. Walker, at 4 o'clock p. m., September
thirteenth, A. D. 1877.

W. R. THRALL,
U. S. Marshal,
By B. H. BOSWICK,
Dept. U. S. Marshal.

And afterwards, to wit, on the twentieth day of September, in the year of our Lord one thousand eight hundred and seventy-seven, came the said marshal to whom the second writ of summons was in form aforesaid directed, and returned the same into the clerk's office of the said court with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

Second writ.—Marshal's return.

Received this writ at Cincinnati, on the 11th day of September, A. D. 1877, and served the same in Scioto County, Ohio, as follows, to wit:

Served personally on J. L. Watkins, on September 13th, at two p. m.; and on Melancton T. Burke, on September 13th, at 3½ p. m.; and on David B. Cotton, September 15th, at 11 a. m.; and on Trusten M. Lynn, on September 13th, at 3½ p. m.; and on William Hughes, on September 15th, at 11 a. m; and on Albert McFarland, on September
17th, at 9 a. m.; and on Felix G. Burke, on September 17th,
16 at 11 a. m.; and on Edward H. Hope, on the 18th September,
again.

W. R. THRALL,
U. S. Marshal,
By THOS. T. YEAGER,
Dept. U. S. Marshal, S. D. Ohio.

And afterwards, to wit, on the sixteenth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, an entry was made on the journal of said court, in said cause, clothed in the words and figures following, to wit:

Journal entry, s. p. 16.

BASIL F. WARNOCK, ADMINISTRATOR, ETC.,
vs.
GEORGE DAVIS ET AL.
} Default set aside.

On motion, and by consent of parties, it is ordered by the court that the default herein be, and the same is hereby, set aside, and the defendants have leave to file their answer therein forthwith, and
20 the same is accordingly filed; which said answer is in the words and figures following, to wit:

Answer.

U. S. circuit court, southern district of Ohio.

BASIL F. WARNOCK, ADMINISTRATOR, ETC.,
vs.
GEORGE DAVIS ET AL.

The defendants served herein now come, and for answer to the petition, as amended, say:

FIRST DEFENSE.

That at the time of issuing said policy of insurance, and at the time of the assignment of the same, the said Scioto Trust Association had an insurable interest in the life of the said Henry L. Crosser, and they deny that said policy was assigned by the said Crosser to the said Scioto Trust Association in trust for any purpose whatsoever, but, on the contrary, they aver that nine-tenths interest in the policy was assigned by the said Crosser to said Scioto Trust Association
21 in good faith, and for a good and valuable consideration. Defendants deny that said policy was made payable to the estate of the said Crosser, but, on the contrary, they aver that the same was made payable to the order of the said Crosser. And they further aver that the said Crosser in his lifetime, and at the same time that he assigned nine-tenths thereof to said Scioto Trust Association, gave to said association a power of attorney to collect the remaining one-tenth, and in and by said power of attorney ordered and directed said one-tenth to be paid to Kate Crosser, wife of the said Henry L. Crosser. And these defendants further say that after the death of the said Henry L. Crosser, and after the collection of the amount of said policy of insurance, the said Scioto Trust Association did pay to the said Kate Crosser the one-tenth part of the amount collected as aforesaid, less
# the amount previously paid for the benefit of said Henry L. Crosser, and upon such payment being made she (the said Kate Crosser) did receipt to the said Scioto Trust Association in full for her interest in said policy of insurance. And defendants deny that plaintiff, as administrator of the said Henry L. Crosser, has any interest in said policy of insurance, or any right to recover the amount claimed, or any part thereof.

22 SECOND DEFENSE.

That the transaction between the said Henry L. Crosser, the Protection Life Insurance Company, of Chicago, Illinois, and the Scioto Trust Association, of Portsmouth, Ohio, referred to in the petition, was as follows, and not otherwise, that is to say: On the 27th day of February, A. D. 1872, the said Henry L. Crosser, now deceased but then in full life, being desirous of procuring an insurance upon his life and not being able himself to bear the expense thereof, applied to the said Scioto Trust Association to procure such insurance for him, and for that purpose, on that day, made and entered into an agreement in writing with said association, in the words and figures following, to wit:

Agreement.

This agreement, by and between Henry L. Crosser, of the first part, 27 years old, tanner by occupation, residing at town of Springville, county of Greenup, State of Kentucky, and The Scioto Trust Association, of Portsmouth, Ohio, of the second part, witnesses: Said party of the first part having this day made application to the Protection Life
Insurance Company, of Chicago, Illinois, for policy on his life,
23 limited to the amount of $5,000.00, hereby agrees to and with the
said Scioto Trust Association that nine-tenths of the amount due and payable on said policy at the time of the death of the party of the first part shall be the absolute property of, and be paid by, said Protection Life Insurance Company to said Scioto Trust Association, and shall by said party of the first part be assigned and transferred to said Scioto Trust Association, and the remaining one-tenth part thereof shall be subject to whatever disposition said party of the first part shall make thereof in his said transfer and assignment of said policy. That the policy to be issued on said application shall be delivered to and forever held by said Scioto Trust Association, said party of the first part hereby waiving and releasing and transferring and assigning to said Scioto Trust Association all his right, title, and interest whatever in and to said policy, and the moneys due and payable thereon at the time of his death, save and except the one-tenth part of such moneys being subject to his disposition as aforesaid; also to keep the Scioto Trust Association constantly informed concerning his residence, p. o.
address, and removals; and further, that said party of the first
24 part shall pay to the said Scioto Trust Association a fee of $6.00
in hand on the execution and delivery of this agreement, and annual dues of $2.50 to be paid on the first of July of every year hereafter, and that in default of such payments the amounts due by him for fees or dues shall be a lien on and be deducted from his said one-tenth part.

In consideration whereof the said Scioto Trust Association, of the second part, agrees to and with said party of the first part to keep up and maintain said life insurance at their exclusive expense, to pay all dues, fees, and assessments due and payable on said policy, and to keep said party of the first part harmless from the payment of such fees, dues, and assessments and to procure the payment of one-tenth part of the moneys due and payable on said policy after the death of said party of the first part, when obtained from and paid by said Protection Life Insurance Company, to the party or parties entitled thereto, according to the disposition made thereof by the said party of the first part in his said transfer and assignment of said policy, subject to the

aforesaid lien and deduction. It is hereby expressly understood and agreed by and between the parties hereto, that said Sciota Trust Association do not in any manner obligate themselves to said party
25 of the first part for the performance by said Protection Life Insurance Company of its promises or obligations contained in the policy issued on the application of said party of the first part and herein referred to.

Witness our hands this 27th day of February, A. D. 1872.

HENRY L. CROSSER.
THE SCIOTO TRUST ASSOCIATION,
By A. McFARLAND, *President*,
GEORGE DAVIS, *Treasurer*.

[U. S. int. revenue, five cents.]

Afterwards, on the same day, in pursuance of said agreement, the said Crosser made application to the said Protection Life Insurance Company for a policy of insurance upon his life, in the sum of five thousand dollars, upon which said application said insurance company on the same day, to wit, the 27th day of February, A. D. 1872, issued to the said Crosser the policy mentioned in the petition. On the next day thereafter, being the 28th day of February, A. D. 1872, the said Crosser, for the purpose of carrying out his said agreement with the said association, and for and upon the considerations therein expressed, assigned and transferred an interest of nine-tenths part in his said policy of insurance to said association, by an instrument of writing, whereby he also constituted said association his attorney to collect the
26 moneys due upon said policy at his death, and provided for the payment of one-tenth part thereof, to his wife, Kate Crosser; which said instrument of writing is in the words and figures following; to wit.

"In consideration of the terms and stipulations of a certain agreement concluded by and between the undersigned and the Scioto Trust Association of Portsmouth, Ohio, and for value received, I hereby waive and release, transfer and assign to said Scioto Trust Association all my right, title, and interest in and to the within life insurance policy No. 3247, issued to me by the Protection Life Insurance Company, of Chicago, Illinois, and all sum or sums of money due, owing, and recoverable by virtue of said policy, save and except the one-tenth part of the same, which tenth part, after deducting therefrom the amount, if any, which I may owe to said Scioto Trust Association for fees or dues, shall be paid to Kate Crosser, or, in case of her death, to such person or persons as the law may direct. And I hereby constitute, without power of revocation on my part, the said Scioto Trust Association my attorney, with full power in their own name to collect and receipt for the whole amount due and payable on said policy at the time of my death, to keep and retain that portion thereof which is the absolute and
27 exclusive property of said Scioto Trust Association, to wit, nine-tenths thereof, and to pay the balance, one-tenth part thereof, when thus obtained and received from the said Protection Life Insurance Company, to the party or parties entitled thereto, after first deducting therefrom, as above directed and stipulated, the amount, if any, due from me at the time of my death to said Scioto Trust Association for fees and dues.

"Witness my hand and seal this 28th day of February, A. D. 1872.

"HENRY L. CROSSER." [SEAL.]

Upon the issuing of said policy the said association paid to the said insurance company for the said Crosser, and in pursuance of said agreement, for advance dues, the sum of twenty dollars, and thereafter, on the 16th day of April, A. D. 1872, and on the 16th day of April, 1873, paid to said insurance company, for annual dues stipulated for in said policy, the further sum of ten dollars; that is to say, five dollars on the 16th day of April, 1872, and five dollars on the 16th day of April, 1873, and from time to time, from and after the issuing of said policy to the time of the death of the said Crosser, paid to said insurance company certain assessments stipulated for in said policy, amounting
28 in all to the sum of two hundred dollars, which, together with said moneys paid for advance and annual dues as aforesaid, made a total sum of $230.00 paid by said association for said Crosser under said agreement. Upon the death of said Crosser, and on or about the 16th day of May, A. D. 1874, the said association under and by virtue of said assignment of said policy hereinbefore set forth, and the power of attorney therein contained, collected from the said insurance company the full amount of said policy, to wit, five thousand dollars, on the 23d day of May, 1874, in accordance with the terms of said assignment, paid to the said Kate Crosser, wife of the said Henry L. Crosser, the full one-tenth part of said moneys so collected, to wit, the sum of five hundred dollars, less, however, the sum of eight dollars and fifty cents due to said association from the said Henry L. Crosser for the fee and annual dues mentioned in said agreement. And the said Kate Crosser then receipted in writing to the said association for the said moneys in full of the amount due her on said policy and in full discharge of all her interest in said policy.

And these defendants therefore aver that at the time of the issuing of said policy and at the time of the assignment of the same the
29 said Scioto Trust Association had an insurable interest in the life of the said Henry L. Crosser, and they deny that said policy was assigned by the said Crosser to the said Scioto Trust Association in trust for any purpose whatsoever, and they deny that said policy was made payable to the estate of the said Henry L. Crosser, but on the contrary thereof, they aver that the same was made payable to his order. And they aver that said Scioto Trust Association made and entered into said agreement with the said Henry L. Crosser in good faith, and that they have in all respects carried out and performed the same on their part.

THIRD DEFENSE.

And for a third ground of defense the defendants adopt the averments of their second defense, and make the same part hereof the same as if herein rewritten. And they further aver that said agreement relating to said policy of insurance as between the said Protection Life Insurance Co., the said Scioto Trust Association, and the said Henry L. Crosser was entered into in good faith with full knowledge of all the facts, no advantage was in any way taken of said Crosser, nor was he in any way deceived or defrauded. Said Scioto Trust Association, during the lifetime of the said Crosser, and with his full knowl-
30 edge and consent, paid to said Protection Life Insurance Company all assessments on account of said policy, and all other demands provided for in said agreement of February 27th, 1872, and in good faith performed and carried out said agreement on their part, and after the death of the said Henry L. Crosser made full payment of

the one-tenth interest in said policy to the said Kate Crosser, and to her full acceptance and satisfaction; and for which payment so made she, the said Kate Crosser, executed to said Scioto Trust Association her receipt in full, as hereinbefore stated, and by reason of the premises the defendants say that the plaintiff is estopped from setting up his said claim, and is not entitled to recover the same or any part thereof.

W. A. HUTCHINS AND
THOMPSON AND TURLEY,
Defendants' Attorneys.

UNITED STATES OF AMERICA,
State of Ohio, County of Scioto, ss:

Melancthon T. Burke, being sworn, says the facts stated and allegations in the foregoing answer of himself and codefendants are, as he believes, true.

MELANCTHON T. BURKE.

Signed in my presence and sworn to before me this 15th day of October, A. D. 1877.

[SEAL.]

MATH. KRIEKER,
N. Public.

31 And afterwards, to wit, on the twenty-ninth day of June, 1878, a further entry was made on the journal of said court in said cause clothed in the words and figures following, to wit:

Leave to answer.

BASIL F. WARNOCK, ADMINISTRATOR, ETC.,
vs.
GEORGE DAVIS ET AL.

By consent of parties it is ordered that the default herein be, and the same is hereby, set aside, and D. B. Cotton, defendant, has leave to file his separate answer herein forthwith, and the same is accordingly filed.

Which said answer is in the words and figures following, to wit:

Separate answer of David B. Cotton.

Circuit court of the United States, southern district of Ohio.

BASIL F. WARNOCK, ADM'R, &C., PL'FF,
vs.
GEORGE DAVIS ET ALII, DEF'TS.

The said David B. Cotton now comes, and by leave of the court, &c., for his separate answer to the original and amended petition of plaintiff, says that about the 5th of January, 1874, with the consent of 32 his then copartners, he sold and transferred his interest and share in the Scioto Trust Association and withdrew therefrom, and has not since that time had any interest or share in said association. He denies that at the time said association collected and received the amount of the insurance upon the life of the said Crosser he, the said Cotton, was the partner of said other defendants or either of them, or was a member of said Scioto Trust Association, or had at that time any interest in its business. He denies that as a member of said association, or as a partner of said other defendants or either of them, or in any way whatever, he had or received any part of said insurance upon the life of the said Crosser, or that he ever received any amount upon or derived any benefit from the said life policy mentioned in said petition.

He denies all liabilities to the plaintiff arising out of said transaction. He denies that he received in any way any amount upon any life policy issued in favor of the said Crosser, or that he his accountable in any way for any amount received by said trust association upon any such policy.

MOON & NEWMAN,
Att'ys for Def't D. B. Cotton.

33 UNITED STATES OF AMERICA,
State of Ohio, Scioto County, ss:

The said David B. Cotton, being sworn, says he believes the facts stated and the allegations contained in his foregoing answer to be true.

DAVID B. COTTON.

Signed in my presence and sworn to before me by David B. Cotton February 26th, 1878.

JAMES M. DAWSON,
Notary Public in & for Scioto County, Ohio.

34 And afterwards, but on the same day and year last aforesaid, an entry was made upon the journal of said court, and said cause, and clothed in words and figures following, to wit:

BASIL F. WARNOCK, ADM'R,
vs. } 2520. Money. Judgment for def't.
GEORGE DAVIS ET ALS.

This day came the parties, by their attorneys, and in writing waived the intervention of a jury, and submit this case to the court upon the issues joined; and the court, on consideration thereof, and being fully advised in the premises, find the issue to be in favor of the defendants, and that the plaintiff is not entitled to recover against said defendants on his said petition. 35 It is by the court therefore considered and adjudged, that the said defendants go hence without day and recover of the said plaintiff their costs in this behalf expended, taxed at $, and execution is awarded therefor. To which finding and judgment of the court the plaintiff, by his attorney, excepts and gives notice of a motion for a new trial, for reasons on file.

And afterward, to wit, on the 11th day of December, in the year last aforesaid, a further entry was made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

BASIL F. WARNOCK, ADM'R
vs. } 2520. Money.
GEORGE DAVIS AND OTHERS.

This day this cause came on to be heard upon the motion of plaintiff for a new trial, heretofore filed herein, and was argued by counsel and submitted; on consideration whereof, the court overrule' said motion.

It is by the court therefore considered, that said defendants go hence without day and recover of said plaintiff their costs in this behalf expended, taxed at $, and execution is awarded therefor. To
36 which ruling and judgment the plaintiff, by his attorney, excepts.

And afterward, to wit, on the 1st day of February, in the year of our Lord one thousand eight hundred and seventy-nine, a further entry was made upon the journal of said court, in said cause, clothed in words and figures following, to wit:

BASIL F. WARNOCK
vs. } 2520. Money.
GEORGE DAVIS ET AL.

And now comes the plaintiff and presents to the court his certain true bill of exceptions, which is signed, sealed, and ordered to be made a part of the record in this case.

Which said bill of exceptions is in the words and figures following, to wit:

37 *Bill of exceptions.*

United States circuit court southern district of Ohio.

BASIL F. WARNOCK, ADMINISTRATOR, ETC., OF the estate of Henry L. Crosser, deceased, plaintiff,
vs.
GEORGE DAVIS ET AL., DEFENDANTS.

Be it remembered that at the February term, 1878, of said court the action above mentioned came on for trial before the honorable P. B. Swing, sitting as a judge of the said circuit court, and by consent and agreement of parties, the jury being waived, was submitted to the court. And the plaintiff, to maintain his action, offered and read in evidence the deposition of Edward D. Cooke, which is hereunto annexed, marked Exhibit A, and made a part hereof, and thereupon the plaintiff rested his case; whereupon the defendants also rested their case without offering any testimony whatever. And the foregoing being all the testimony offered by the parties, the case was thereupon argued by counsel, and submitted to the court. And on consideration whereof,
38 the court found the issue for the defendants, and judgment was thereupon entered in their favor, and against the plaintiff for their costs, in said cause expended, taxed at $, and that they go hence without day, to which plaintiff then excepted, and thereupon, on the 29th day of June, A. D. 1878, filed his motion that the said finding and judgment as to all said defendants, except D. B. Cotton, be set aside and that a new trial be granted, because—

1st. The finding and judgment are not sustained by the evidence, and are contrary to the same.

2d. They are contrary to law.

3d. Upon the law and evidence, judgment should have been given to the plaintiff and against the defendants.

Which motion the court, the honorable Philip B. Swing, reserved for hearing before himself and the honorable John Baxter, judge of the circuit court of the United States for the sixth judicial circuit; and, accordingly, at the October term, A. D. 1878, of the said court, said motion came on to be heard on the 11th day of December, A. D. 1878, before their honors Judges Baxter and Swing, and being argued by counsel, was submitted to them for decision. On consideration 39 whereof, the court overruled said motion, and refused to grant a new trial, to which ruling and refusal the plaintiff again excepted, and presented this, his bill of exceptions in that behalf, and prayed that the same be allowed, signed and sealed by the court, and filed in the said action, all of which is now, at said October term, A. D. 1878, of said court, accordingly granted, and done by the court.

PHILIP B. SWING, [SEAL.]
U. S. District Judge, S. D. Ohio,
holding the Circuit Court.

EXHIBIT A—BILL OF EXCEPTIONS.

Deposition of Edward D. Cooke (taken on behalf of the plaintiff.)

THE UNITED STATES OF AMERICA,
Northern District of Illinois, Cook County, ss:

J. B. Foraker, being first duly sworn, says that he is one of the attorneys of record in a certain suit now pending in the circuit court of the United States for the southern district of Ohio, wherein Basil F. Warnock, administrator, &c., is plaintiff, and George Davis and others are defendants; that he desires to take the deposition de 40 bene esse in said action of Edward D. Cooke; that he has given due notice thereof to said defendants; that said Edward D. Cooke lives in the city of Chicago, State of Illinois, more than one hundred miles distant from said court where said case will be tried.

J. B. FORAKER.

Sworn to before me, and signed in my presence, this 18th day of September, A. D. 1877.

[SEAL.] JOHN S. MILLER,
Notary Public.

The deposition de bene esse of Edward D. Cooke, of the city of Chicago, in the county of Cook, and State of Illinois, a witness of lawful age, produced, sworn and examined upon his corporal oath pursuant to the notice hereto attached, on the eighteenth day of September, in the year of our Lord eighteen hundred and seventy-seven, at the office of Messrs. Cooper, Packard & Gurley, room 24, Merchants' Building, situated at the northwest corner of La Salle and Washington streets, in the said city of Chicago, by me, John S. Miller, a notary public in and for the said county of Cook, in the said State of Illinois, in a certain cause now pending and undetermined in the circuit court of the United States within and for the southern district of Ohio, wherein Basil F. Warnock, administrator of the estate of Henry L. Crosser, deceased, is plaintiff, 41 and George Davis and others are defendants. On behalf of the said plaintiff, the said Edward D. Cooke, living at a greater distance from the place of trial of said cause than one hundred miles.

J. B. Foraker, esq., appeared for plaintiff, and A. C. Thompson, esq., appeared for defendants.

The said EDWARD D. COOKE, being by me first duly cautioned and sworn as a witness *by me*, previous to the commencement of his examination, to testify the whole truth, and being carefully examined, testified and deposed as follows:

Direct examination by Mr. FORAKER, pl't'ff's attorney:

1st question. Please state your name, age, residence, and occupation.

Answer. My name is Edward D. Cooke; my age is 28 years; my residence is Chicago; and I am a lawyer by profession.

2nd question. Please state what connection, if any, you have with the Protection Life Insurance Company, of Chicago, Illinois.

Answer. I am the receiver of that company, appointed by the circuit court of Cook County, Illinois, on the 6th of August, 1877.

3rd question. State whether or not, as such receiver, you are in control and have possession of the books and papers of said company?

42 Answer. I have.

4th question. State whether or not among those papers you have a certain policy of insurance issued by said company, number 3247, on the life of Henry L. Crosser.

Answer. I have that policy.

5th question. Will you produce the same and allow a copy thereof to be attached to your deposition as a part hereof, with all endorsements that may be thereon?

Answer. Yes, sir; I hand that policy, with a draft, a check, and an assignment of said policy attached thereto, and an endorsement receipting payment in full thereon to the notary taking this deposition, John S. Miller, a copy of which is attached to this, my deposition, marked Exhibit A, and made a part hereof.

(A copy of said policy, draft, check, assignment, receipt of payment, and all endorsements thereon is hereto attached, marked Exhibit A, J. S. M., N. P., and made a part hereof.)

6th question. State whether or not you have in your possession the application of said Crosser for said insurance policy. And, if so, will you produce the same and attach a copy to your deposition?

Answer. I have that application; it is handed to the notary,
43 and a copy thereof is attached to this, my deposition, marked
Exhibit B, and made a part hereof.

(A copy of said application is attached hereto and marked Exhibit B, J. S. M., N. P.)

7th question. State whether or not you have in your possession proofs of the death of the said Henry L. Crosser. And, if so, will you produce the same, and attach a copy thereof to your deposition?

Answer. Yes, sir; I have the proof of death referred to, to which are attached an agreement between said Crosser and the Scioto Trust Association and an assignment of said policy to said association. These papers are produced to the notary, and copies thereof attached to this my deposition, marked Exhibit C, and made a part hereof.

(Said proof of death is copied, and a copy thereof and of the agreement referred to in the answer of said witness last above contained is hereto attached, marked Exhibit C, J. S. M., N. P.)

8th question. Will you not attach the originals of all these papers you have described to your deposition as exhibits thereof?

Answer. I decline to do this, as I hold them under an order of court and may need them hereafter. I have no authority to part with the originals.

9th question. Please state who L. P. Hilliard and A. W. Ed-

44 wards, whose names are signed to the check of May 16, 1874, of which you have attached a copy hereto as Exhibit A, were. I see they sign as president and secretary.

Answer. They were the president and secretary of the company; that is, the Protection Life Insurance Company.

The testimony was here closed, there being no cross-examination, and the further taking of said deposition was adjourned to to-morrow, September 19th, A. D. 1877, at two o'clock in the afternoon, at this place, to read said testimony to the said witness, and to have him subscribe and swear to the same.

September 19th, A. D. 1877, at 2 o'clock p. m., the further taking of said deposition was resumed at the same place, pursuant to adjournment, and the said deposition was carefully and thoroughly read over to said witness, and he here subscribes and swears to the same.

EDWARD D. COOKE.

Subscribed and sworn to by the said witness, Edward D. Cooke, before me, this 19th day of September, A. D. 1877.

JOHN S. MILLER,
Notary Public.

EXHIBIT A.—(J. S. M., N. P.)

The Protection Life Insurance Company, of Chicago, Illinois,

No. 3247.] [$5,000.

45 In consideration of the representations and agreements ma in the application therefor, and the sum of twenty dollars in ha paid, and of the further sum of five dollars to be paid on the first d of January in each year hereafter, does hereby issue this policy to Hen L. Crosser, of Springville, county of Greenup, and State of Kentuck with the following agreements:

Upon the death of the said Henry L. Crosser, he having conforme to all the conditions thereof, and on satisfactory proof of said death being filed with the secretary of the company, an assessment shall be made upon all the policy-holders of the company, according to the policy held by each, for as many dollars as there are policy-holders in the company whenever the number of policy-holders does not exceed twenty-five hundred; and whenever the number of policy-holders is more than twenty-five hundred, then the assessment shall be for an amount in proportion to the membership of the company, not exceeding the limit of this policy, in the ratio of one dollar for each $5,000 policy-holder, and such a proportional part of one dollar for each $2,500 policy-holder as twenty-five hundred is of the total number of policy-holders in the company, and the sum collected on such assessment (less the added cost for collection) shall be paid to his order, at the office of said company in Chicago, within ninety days from the time of filing said proof of

46 death: Provided, however, that in no case shall the payment upon this policy exceed five thousand dollars.

And in case any of said policy-holders who shall pay, or shall have paid, all dues and previous assessments refuse or neglect to pay the assessments made upon them on this policy, the company agrees to pay the said defaulted assessment at the time and place above specified.

And it is hereby further agreed that the company guarantees at least the payment of one thousand dollars upon this policy, if in force, in case of the death of the said assured within five years from the date hereof; and it is also further agreed by the company that all moneys collected by assessment, as aforesaid (less the cost of collection), shall be applied only to the payment of death claims.

This policy is issued by the company, and accepted by the assured, upon the following express conditions and agreements:

1. The person to whom this policy is issued agrees to pay to the company an annual due of five dollars on the first day of January in each year, and further agrees to pay, on the death of each policy-holder in the company, an assessment not to exceed one dollar whenever the number of policy-holders does not exceed five thousand; and
47 whenever the number of policy-holders is more than five thousand, then such a proportional part of this assessment as five thousand is of the whole number of policy-holders in the company: Provided, however, that on the death of the holder of a $2,500 policy, when the total number of policy-holders in the company exceeds twenty-five hundred, then the holder of this policy agrees to pay such a proportional part of this assessment as twenty-five hundred is of the total number of policy-holders in the company. The holder of this policy also agrees to pay an additional amount of ten cents in each case for cost of collection. The said annual dues, assessments, and collection costs to be forwarded to the office of the company within thirty days after date of notice.

2. The assured further agrees, that *if* the said assessment, collection, costs, and annual due' are not received by the company within thirty days from the date of notice, then this policy shall be null and void, and of no effect. A printed or written notice directed to the address of each and every member, as it appears in the books of the company, and deposited in the post-office, or delivered by an agent of the company, or printed in a newspaper published by the company and forwarded as aforesaid, shall be deemed legal notice.

48 3. Due notice must be given to the company by each policy-holder who shall change his or her residence, post-office address, occupation or name.

4. If the assured by this policy shall be personally engaged in blasting, mining, submarine operations, or other extra-hazardous occupations, or shall enter or be engaged in any military or naval service, except in time of peace, without in each of the foregoing cases having first obtained the written consent of the company, or shall die in consequence of a duel, or the violation or attempted violation of the laws of any nation, state, or province, or shall become so far intemperate as to seriously or permanently impair his or her health, or to produce delirium tremens, or if any of the statements or declarations in the application for this policy, and upon the faith of which it is issued, shall be found in any respect untrue, then in every such case this policy shall be null and void and of no effect, and all moneys which may have been paid, and all rights and benefits which may have accrued on account of this policy, shall be absolutely forfeited.

5. All policy-holders are at liberty to travel by sea, lake, or river, by first-class steamers or sailing vessels, and to reside in any part of the United States, British provinces, or Europe.

6. The company hereby reserves the right, whenever the num-
49 ber of policy-holders of any one amount exceeds the limit of the policy held by them, to assess only policy-holders of similar amounts for deaths in that number.

In witness whereof the Protection Life Insurance Company, of Chicago, has hereunto affixed its corporate seal, and caused this policy to be signed by its president and secretary, at the city of Chicago, State of Illinois, this twenty-seventh day of February, A. D. 1872.

{ PROTECTION LIFE INSURANCE }
{ CO. SEAL, CHICAGO. }

E. S. SKINNER,
President.
PLATTE BURR,
A. Secretary.

[U. S. revenue stamp, 25 cents.]

EXHIBIT A.—(J. S. M., N. P.)

PORTSMOUTH, *May 8th*, 1874.

Received of the Protection Life Insurance Co., five thousand dollars in full of the within policy No. 3247.

SCIOTO TRUST ASSOCIATION,
By A. McFARLAND, *Pres.*
" J. L. WATKINS, *Treas.*
" M. T. BURKE, *Sec'y.*

EXHIBIT A.—(J. S. M., N. P.)

In consideration of the terms and stipulations of a certain agreement this day concluded by and between the undersigned and
50 the Scioto Trust Association, of Portsmouth, Ohio, and for value
received, I hereby waive and release, transfer and assign to said Scioto Trust Association, all my right, title, and interest in and to the within life insurance policy, No. 3247, issued to me by the Protection Life Insurance Company, of Chicago, Illinois, and all sum or sums of money due, owing, and recoverable by virtue of said policy, save and except the one-tenth part of the same, which tenth part, after deducting therefrom the amount, if any, which I may owe to said Scioto Trust Association for fees or dues, shall be paid to Kate Crosser, or, in case of her death, to such person or persons as the law may direct.

And I hereby constitute, without power of revocation on my part, the said Scioto Trust Association my attorneys, with full power in their own name to collect and receipt for the whole amount due and payable on said policy at the time of my death; to keep and retain that portion thereof which is the absolute and exclusive property of said Scioto Trust Association, to wit, nine-tenths thereof, and to pay the balance of one-tenth part thereof, when thus obtained and received from the said Protection Life Insurance Company, to the party or parties entitled thereto, after first deducting therefrom, as above directed and stipulated, the amount, if any, due from me at the time of my death to said Scioto Trust Association for fees and dues.

51 Witness my hand and seal this 28th day of February, A. D. 1872.

HENRY L. CROSSER. [L. S.]

For value received, I hereby transfer, release, make over, and assign all my right and interest represented in the within assignment to J. L. Watkins.

KATE CROSSER.

Witness:
G. F. SHENHOLZ.
ED. R. BURKE.

Pay the within to M. I. Burke, secretary of Scioto Trust Association, or order.

April 13th, 1874.

J. L. WATKINS.

EXHIBIT A.—(J. S. M., N. P.)

PORTSMOUTH, O., *May* 8, 1874.

At sight pay to the order of J. M. Wall, cash., five thousand 00-100 dollars, value received, and charge to account of,

SCIOTO TRUST ASSOCIATION,
By A. McFARLAND, *Pres.*
" J. L. WATKINS, *Treas.*
" M. T. BURKE, *Sec'y.*

To Protection Life Ins. Co., Chicago, Ill.
(Endorsed as follows:) Paid.

STATE SAV. INST.,
By H. C. TOBEY, *Mess.*

Pay Chas. D. Bickford, cas., or order, for collection and return.

J. M. WALL, *C.*

52 EXHIBIT A.—(J. S. M., N. P.)

For Crosser policy, No. 3247.

No. 322.] CHICAGO, *May* 16*th*, 1874.

The Fidelity Savings Bank and Safe Depository, pay A. D. Guild, cash., or order, five thousand .100 dollars in current funds.

L. P. HILLIARD, *Pres.*

A. W. EDWARDS, *Sec'y.*
$5,000.00.

(Endorsed as follows on back:) State Savings Institution. Paid. (On face:) Certified. Geo. M. Gage, A. cash., the Fidelity Savings Bank and Safe Depository.

EXHIBIT B.—(J. S. M., N. P.)

3247. Application.

Name, Henry L. Crosser; No. 3247; age, 27; amount, 5,000; P. O. address, town, Springville; county, Greenup; State, Ky.

CHAS. J. HESS,
Gen. Agent Ohio State Agency.

Address: The Protection Life Insurance Company, of Chicago.

APPLICATION.

The undersigned hereby applies for a policy, limited to $5,000, in the Protection Life Insurance Company, of Chicago, and in order thereto, agrees to answer truthfully the following questions, and in all other respects conform to the conditions of the company:

53 1. Name of applicant (give in full). Henry Lawrence Crosser.

2. Residence (give P. O. address). Springville, county of Greenup, State of Kentucky.

3. Place and date of birth. Germany; born July 5th, 1845; age, nearest birth-day, 27 years.

4. Occupation. Tanner. Married or single? Married.

5. Are your parents living? If so, give age and condition of health. Mother living; aged, 54; health good.

6. If dead, state age at time of death, and of what disease. Father dead; aged 55; disease, consumption.

7. How many brothers (in all) have you had? *No.* 7. Brothers living, 2; ages, 28, 39; health good; brothers dead, 5, ages, 2, 4, 5, 7, 10; disease unknown.

8. How many sisters (in all) have you had? No. 1.

9. Ages and state of health. If any have died, state age at time of death, and disease. Sisters dead 1, aged, 4; disease unknown.

10. What ages have your grand-parents attained? Father's side, ages unknown, but lived to be very old; mother's side, ages unknown, but lived to be very old.

11. Have you ever had any of the following diseases, viz: Consumption dropsy, liver complaint, palpitation, apoplexy, insanity, habitual cough, spitting of blood, rupture, rheumatism, paralysis, fits, scrofula, disease of the heart, kidneys, bladder, or fistula? No.

54 12. Has your family ever been subject to any heridetary disease? No.

13. Have you ever had any serious illness, local disease, or personal injury; if so, of what nature? No.

14. Are you afflicted with any disease, or disorder, infirmity, or weakness tending to impair the constitution, or shorten life? No.

15. Are you free from habits of intemperance, or any excessive indulgence? Yes.

16. Have you ever been examined by any company; if so, when, and with what result? No.

17. Have you been vaccinated, or had the small-pox? Have been vaccinated.

18. Has any physician ever given an unfavorable opinion of your life? No.

19. Are you this day, to the best of your knowledge and belief, free from all disease, infirmity, or weakness tending to impair your constitution, or shorten your life? Yes.

20. Give name of family physician. Dr. Mecorney, Portsmouth, O.

21. Name and residence of an intimate friend. C. L. Osborne, Springville, Ky.

22. To whom do you desire the money paid in case of death? To my order.

It is hereby expressly stipulated and agreed that if a policy 55 shall be issued on the above application, that the dues and assessments required by said policy shall be paid according to the agreements therein made; and it is hereby further expressly stipulated and agreed that the above application and this declaration shall form the basis and consideration of the policy issued to the above-named applicant by the Protection Life Insurance Company; and that if any misrepresentation or fraudulent and untrue answers have been made, or if any facts which should have been stated have been suppressed, or f any omission or neglect to pay any of the dues or assessments on or before the days on which they shall fall due shall take place, then, and in either event, the said certificate shall become null and void, and all money which shall have been paid shall be forfeited.

Dated at Springville, Ky., this 27th day of February, 1872.

H. L. CROSSER,
Applicant.

Questions to be answered by the medical examiner.

1. Name and residence of the person examined. Henry L. Crosser, Springville, Ky.

2. State approximate weight, height, circumference of the chest under vest, figure. Weight, 156; height, 5 feet 10 inches; circumference of chest, forced inspiration, 37 inches; forced expiration 34 inches; figure erect.

56 3. Is the general appearance that of health and vigor? Yes.

4. Are the functions of the brain and nervous system in a healthy state? Yes.

5. Is the respiratory murmur clear and distinct over both lungs? (A.) Yes. (B.) Is the respiration full, easy, and regular? (B.) Yes. (C.) Are there any indications of disease of the organs of respiration or their appendages? (C.) No.

6. (A.) Is the character of the heart's action uniform, free, and steady? (A.) Yes. (B.) Are its sounds and rythm regular and normal? (B.) Yes. (C.) Are there any indications of disease of the heart or of the blood vessels? (C.) No.

7. (A.) State the rate of party's pulse. (A.) 76. (B.) Is it uniform, regular, and steady? (B.) It is.

8. Has the party any habitual cough, expectoration, difficulty of breathing, or palpitation? No.

9. Are the functions of the abdominal and urinary organs in a healthy state? Yes.

10. Is the party exempt from any predisposition, either hereditary or acquired, to any constitutional disease? Yes.

11. Have the parties' parents, brothers, or sisters been exempt from pulmonary or other diseases hereditary in their nature? Yes.

12. If the party is a female, state what is the condition of the menses; whether she has had children, and whether she has had
57 miscarriages, and how many? Has she any disease of the generative organs which would tend to shorten life?

13. Do you recommend the granting of this application? I do.

Dated at Springville, Ky., this 27th day of February, 1872.

(Signed) LOUIS SCHWAB, *M. D.*,
Medical Examiner.

EXHIBIT C.—(J. S. M. N. P.)

Claimant's statement.

Notice is hereby given to the Protection Life Insurance Company, Chicago, Ill., that Henry Crosser, of Springville, county of Greenup, and State of Kentucky, has died; that said Henry Crosser was the same person whose life was insured by the said company by their policy No. 3247, dated Feb'y 27th, 1872, for $5,000.00, amount limited to in said company; that the membership fee, annual dues, and assessments on such policy have been duly paid; that the undersigned are the legal owners of said policy; that the undersigned had a good and valid interest to the amount insured in the life of said deceased, and in proof of claim under said policy do answer as follows:

1. Name of deceased, Henry L. Crosser.
2. Residence, Springville, Kentucky.
3. Occupation at date of issue of policy, tanner, or work in tannery.
58 4. Occupation since insurance was effected, work in tannery most of the time.
5. Place and date of birth, Germany, July 5th, 1845.
6. Place and date of death, Springville, Ky.
7. How long had you known deceased? 5 or 6 years.
8. State all facts regarding cause and circumstances of death. He died of acute pleurites, very suddenly.
9. Had the deceased, during the existence of the policy, been engaged in any military or naval service; or did he die by his own hand; or in consequence of a duel, or the violation of any law? No.
10. Refer to the policy, and state if to your knowledge and belief the deceased complied with the terms contained therein. He did.
11. Is the insurance claimed under assignment? It is under assignment, with power of attorney to collect.
12. If so, by whom was the policy assigned? Henry Crosser.
13. Was the assignment made for a good and valuable consideration? It was. See copy attached hereto.

Dated at Portsmouth this 26th day of September, 1873.

KATE CROSSER.
A. McFARLAND.
GEORGE DAVIS.

59 STATE OF OHIO,
County of Scioto:

On this 26th day of September, 1873, personally appeared before me the above-named Kate Crosser, A. McFarland, and George Davis, to me known, and made oath that the foregoing statements, by them made, are true and full to the best of their knowledge, recollection, and belief.

[NOTARIAL SEAL.] C. McFARLAND,
Notary Public, Scioto County, Ohio.

Attending physician's statement.

1. Name of deceased, Henry L. Crosser.
2. Residence, Springville, Greenup County, Ky.
3. Occupation, tanner.
4. How long have you been acquainted with the deceased? About four months.
5. Were you his attending physician before his last sickness? If so, for what disease, and when? No.
6. Was the deceased afflicted with any chronic diseases; if so, for how long? No.
7. Were you his attending physician during his last sickness and up to the time of his death? Yes.
8. Date of first visit, August 22nd, 1873.
9. Date of last visit, Sept. 11th, 1873.
10. Date of death, Sept. 11th, 1873.
11. State the disease of which the deceased died, and any important
medical fact connected therewith. Acute pleurites. There was
60 apparent internal abscess. The abscess probably burst, as the
patient sank rapidly during his last hours.

12. Was the deceased strictly temperate? I believe he was.

13. Was there any special cause, remote or proximate, for the death, in the habits, occupation, residence, family history, personal constitution, or previous diseases of the deceased? No.

14. Have you stated all the material facts relating to the sickness of the deceased? Yes.

15. State real or apparent age of the deceased. About 30 years, I should judge.

Dated at Portsmouth, Ohio, this twenty-fourth day of September, 1873.

J. P. BING, *M. D.*, *Attending Physician.*

STATE OF OHIO, *County of Scioto:*

On this 25th day of September, 1873, before me, came the above named J. P. Bing, known to me as a physician in regular standing, and made oath that the answers by him given to the foregoing questions are true and full, to the best of his knowledge and belief.

[NOTARIAL SEAL.] C. McFARLAND,
Notary Public, Scioto County, Ohio.

Post-office address, Portsmouth.

Statement of the undertaker.

1. Name of deceased, Henry L. Crosser.
61 2. Residence, Springville, Ky.
3. Occupation, tanner.
4. Did you inter the body of said deceased, and do you know that it was the body of the person described in the accompanying statement of the claimant in this case? Yes.
5. Date of birth, July 5th, 1845.
6. Age at death, about 30 years.
7. Cause of death, acute pleurites.
8. Place and date of death, Springville, Sept. 11th, '73.
9. Place and date of interment, Sept. 12th, '73.

Dated at Portsmouth, this 24th day of Sept. 1873.

J. M. HERDER.

STATE OF OHIO, *County of Scioto:*

On this 24th day of September, 1873, personally appeared before me the above named J. M. Herder, to me known, and made oath that the foregoing statements by him made are true and full, to the best of his knowledge, recollection and belief.

[NOTARIAL SEAL.[C. McFARLAND,
Notary Public Scioto County, Ohio.

Statement of a friend.

1. Name of deceased, Henry Crosser.
2. How long had you known deceased, 5 years.
3. Place and date of death, Springville, Sept. 11th, '73.
4. Age of deceased at death, about 30 years.
62 5. Have you seen the remains or body of the person deceased, and is it, to your knowledge, the same person described in the above named policy of insurance? Yes.
6. State all the facts, within your knowledge, relating to the cause of death. He died very suddenly of acute pleurites.

7. Was the deceased in the habit of using spirituous liquors? If so, did it affect his health? No.

8. Are there any circumstances within your knowledge, information or belief, or have any facts come to your knowledge, inconsistent with the statements hereto attached, made by the claimant and attending physician in this case? If so, state them fully. No.

9. Has the deceased violated any of the conditions of said policy of insurance? No.

Dated at Portsmouth, this 24th day of September, 1873.

JACOB HUBER.
FREDERICK GEYER.

STATE OF OHIO, *County of Scioto:*

On this 24th day of September, 1873, personally appeared before me the above named Jacob Huber and Frederick Geyer, to me known, and made oath that the foregoing statements, by them made, are true and full, to the best of their knowledge, recollection, and belief.

[NOTARIAL SEAL.] C. McFARLAND,
Notary Public Scioto County, Ohio.

63 *Note.*

When the beneficiary under a policy is a minor, proof of the appointment of the guardian must be furnished before the claim will be allowed.

When the beneficiary under a policy is dead (as in the case of a policy in favor of the very person whose life is assured), a certificate will be required from the proper court to show who is authorized to act as administrator or executor of such deceased beneficiary.

When the policy has been assigned, the original assignment, or a properly authenticated copy thereof, must be presented with proofs of death.

When a policy payable by its term, to one beneficiary, if surviving, has by the death of such beneficiary become payable to another, proof of the death of such first beneficiary must be furnished by affidavit of respectable persons well acquainted with such deceased beneficiary.

When a policy is payable to the children, in general, of a person, or to any other class of persons whose names are not separately mentioned in the policy, proof must be furnished of how many children there are, or of how many the class consists, and the names of the persons given. If any are minors, proof of the appointment of the guardian must be furnished.

64 And, in general, when the policy or the death is peculiar in any respect, the forms and proof of claim must be adapted to the peculiar circumstances of the case.

Communications from the company in reference to the claim to be addressed to Mrs. Kate Crosser, Portsmouth, Ohio.

STATE OF OHIO,
County of Scioto, ss:

We, W. A. Hasse, of Portsmouth, in the county of Scioto and State of Ohio, and James H. Shanhols, of Portsmouth, in the county of Scioto and State of Ohio, being duly sworn, on oath say that we are acquainted with Henry Crosser, of Portsmouth, in the county of Scioto and State of Ohio, and that the said Henry Crosser died of acute pleurites, as reported by his physician, on the 11th day of September, 1873, at Springville, in the county of Greenup, State of Ky.; and, further, that we have no interest whatever in the amount to be paid on said policy of insurance.

W. A. HASSE.

Post-office address: Portsmouth, Ohio.

JAMES H. SHANHOLS.

Post-office address:

Subscribed and sworn to before Sept. 24th, 1873.
[NOTARIAL SEAL.]
C. McFARLAND,
Notary Public, Sciota County, Ohio.

65 EXHIBIT C.—(J. S. M., N. P.)

Agreement.

This agreement by and between Henry L. Crosser, of the first part, 27 years old, *of* tanner by occupation, residing at No. street , town of Springville, county of Greenup, State of Kentucky, and the Scioto Trust Association, of Portsmouth, Ohio, of the second part, witnesses:

Said party of the first part having this day made application to the Protection Life Insurance Company, of Chicago, Illinois, for policy upon his life, limited to the amount of $5,000, hereby agrees to and with the said Scioto Trust Association that nine-tenths of the amount due and payable on said policy, at the time of the death of said party of the first part, shall be the absolute property of, and be paid by said Protection Life Insurance Company to, said Scioto Trust Association, and shall, by said party of the first part, be assigned and transferred to said Scioto Trust Association, and the remaining one-tenth part thereof shall be subject to whatever disposition said party of the first part shall make thereof in his said transfer and assigment of said policy; that the policy to be issued on said application shall be delivered to, and forever held by, said Scioto Trust Association, said
66 party of the first part hereby waiving and releasing and transferring and assigning to said Scioto Trust Association all his right, title, and interest whatever in and to said policy, and the moneys due and payable thereon, at the time of his death, save and except the one-tenth part of such moneys being subject to his disposition as aforesaid; also to keep the Scioto Trust Association constantly informed concerning his residence, post-office address, and removals; and, further, that said party of the first part shall pay to said Scioto Trust Association a fee of six dollars in hand on the execution and delivery of this agreement, and annual dues of two dollars and fifty cents, to be paid on the first of July of every year hereafter, and that in default of such payments the amounts due by him for fees or dues shall be a lien on, and be deducted from, his said one-tenth part.

In consideration whereof the said Scioto Trust Association, of the second part, agrees to and with said party of the first part to keep up and maintain said life insurance at their exclusive expense, to pay all fees, dues, and assessments due and payable on said policy, and to keep said party of the first part harmless from the payment of such fees, dues, and assessments, and to procure the payment of one-tenth
67 part of the moneys due and payable on said policy after the death of said party of the first part, when obtained from, and

paid by, said Protection Life Insurance Company to the party or parties entitled thereto, according to the disposition made thereof by said party of the first part in his said transfer and assignment of said policy, subject to the aforesaid lien and deduction.

It is hereby expressly understood and agreed by and between the parties hereto that said Scioto Trust Association do not, in any manner, obligate themselves to said party of the first part for the performance by said Protection Life Insurance Company of its promises or obligations contained in the policy issued on the application of said party of the first part and herein referred to.

Witness our hands this 27th day of Feb'y, A. D. 1872.

HENRY L. CROSSER.
THE SCIOTO TRUST ASSOCIATION,
By A. MCFARLAND, *Pres't.*
GEORGE DAVIS, *Treas.*

PORTSMOUTH, OHIO, *September* 27, 1873.

I hereby certify that the within agreement and assignment are true and exact copies of the original ones handed me for comparison.

In witness whereof I have hereunto set my hand and seal.

C. MCFARLAND,
Notary Public, Scioto County, Ohio.

EXHIBIT C.—(J. S. M., N. P.)

68 In consideration of the terms and stipulations of a certain agreement concluded by and between the undersigned and the Scioto Trust Association, of Portsmouth, Ohio, and for value received, I hereby waive and release, transfer and assign to said Scioto Trust Association, all my right, title, and interest in and to the within life insurance policy No. 3247, issued to me by the Protection Life Insurance Company, of Chicago, Illinois, and all sum or sums of money due, owing, and recoverable by virtue of said policy, save and except the one-tenth part of the same, which tenth part, after deducting therefrom the amount, if any, which I may owe to said Scioto Trust Association for fees or dues, shall be paid to Kate Crosser, or, in case of her death, to such person or persons as the law may direct.

And I hereby constitute, without power of revocation on my part, the said Scioto Trust Association my attorneys, with full power in their own name to collect and receipt for the whole amount due and payable on said policy at the time of my death, to keep and retain that portion thereof which is the absolute and exclusive property of said Scioto Trust Association, to wit, nine-tenths thereof, and to pay the balance of one-tenth part thereof, when thus obtained and received from the said Protection Life Insurance Company, to the party or parties entitled thereto, after first deducting therefrom as above directed and stipulated the amount, if any, due from me at the time of my death to said Scioto Trust Association for fees and dues.

69 Witness my hand and seal this 28th day of February, A. D. 1872.

HENRY L. CROSSER. [SEAL.]

UNITED STATES OF AMERICA,
Northern District and State of Illinois, Cook County, ss:

I, John S. Miller, a notary public in and for the said county of Cook, in the said northern district and State of Illinois, duly appointed com-

missioner and qualified, and residing at the city of Chicago, in said county of Cook, do hereby certify that the foregoing deposition de bene esse of Edward D. Cooke, of the city of Chicago aforesaid, whose name is thereto subscribed, was taken by and before me, as such notary public, at the time and place therein stated, pursuant to the notice to that effect hereto attached, in the suit between Basil F. Warnock, administrator of the estate of Henry L. Crosser, deceased, plaintiff, and George Davis and other defendants, in said notice mentioned; that previous to the commencement of the examination of the said Edward D. Cooke, as a witness in the suit aforesaid, he was duly cautioned and sworn by me as such notary public to testify the whole truth in relation to the matters in controversy between the said Basil F. Warnock, administrator of the estate of Henry L. Crosser, deceased, plaintiff, and the said George Davis and others, defendants, so far as he should be interested concerning the same; that the said deposition was taken at the office of
70 Messrs. Cooper, Packard and Gurley, room 24 in the Merchants' building, situated at the northwest corner of La Salle and Washington streets, in said city of Chicago, on the days above stated, the 18th and 19th days of September, A. D. 1877, and the testimony of the said Edward D. Cooke was then and there reduced to writing by me and by no other person, and after the same was so reduced to writing the same was carefully read over to the said witness, Edward D. Cooke, both the interrogatories and answers thereto as written down, and that thereupon the same was subscribed and sworn to by the said deponent, Edward D. Cooke, before me as such notary public, at the place and on the day and year aforesaid.

I further certify that the said witness, Edward D. Cooke, lives at a greater distance from the place of trial of said suit between the said Basil F. Warnock, administrator of the estate of Henry L. Crosser, deceased, plaintiff, and George Davis and others, defendants, than one hundred miles, as was made to appear to me before the commencement of said examination of the said Edward D. Cooke as a witness as aforesaid, by the affidavit of J. B. Foraker, hereto attached, and for this reason the said deposition was taken de bene esse as aforesaid.

I further certify that the said witness, Edward D. Cooke, refused to allow the originals of the papers in his possession referred to and produced before me in taking said deposition, as above mentioned,
71 to be attached to this deposition or to leave his custody and control, for the reason that said papers were in his possession and custody as the receiver of the Protection Life Insurance Company, of Chicago, Illinois, under appointment of the circuit court of Cook County, and he was not authorized or permitted to allow said papers to be taken from his custody and control, or from the jurisdiction of the said circuit court of Cook County, without the order of said court, as appears from said deposition, and that true and correct copies of said original papers are attached to and made part of said depositions in place and stead of said original papers as exhibits thereto, and marked as above stated.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at Chicago aforesaid, this 19th day of September, A. D. eighteen hundred and seventy-seven.

JOHN S. MILLER,
Notary Public.

And afterward, to wit, on the twenty-eighth day of February, in the year last aforesaid, came the said plaintiff and filed in the clerk's office of the court aforesaid his certain error bond in said cause, clothed in the words and figures following, to wit:

72 Circuit court of the United States, southern district of Ohio.

Basil F. Warnock, adm'r, &c.,
vs.
George Davis et al.

Know all men by these presents that we, H. S. Bundy and C. M. Overman, are held and firmly bound unto George Davis and others, in the sum of five hundred dollars, to be paid to the said George Davis et al., their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 14th day of February, 1879. Whereas the above-named Basil F. Warnock, administrator, hath sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named Basil F. Warnock, administrator, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

73 H. S. BUNDY. [SEAL.]
C. M. OVERMAN. [SEAL.]

Sealed & delivered in presence of—
O. S. Frice,
Frank S. Glenn,
As to C. M. Overman.

Sealed and delivered in presence of—
W. E. Bundy,
Denis Doyle,
As to H. S. Bundy.

The above security is approved.

P. B. SWING,
District Judge of the United States, S. D. Ohio.

74 The United States of America,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing to be a true and correct copy of the proceedings and record in the case wherein Basil F. Warnock, a citizen of the State of Kentucky, and administrator of the estate of Henry L. Crosser, late of Greenup County, State of Kentucky, deceased, is plaintiff, and George Davis, William Hughes, Albert McFarland, Jefferson L. Watkins, Edward N. Hope, Augustine O. Walker, Melancthon T. Burke, David B. Cotton, Felix G. Burke, and Trustem M. Lynn are defendants, as the same remains in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 16th day of April, A. D. 1879, and in the 103rd year of the Independence of the United States of America.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. Cir. C't, S. D. O.

75 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Basil F. Warnock, administrator of Henry L. Crosser, deceased, and George Davis, William Hughes, Albert McFarland, Jefferson L. Watkins, Edward N. Hope, Melancthon T. Burke, Felix G. Burke, Trustem M. Lynn, and Augustine O. Walker, a manifest error hath happened to the great damage of the said Basil F. Warnock, administrator aforesaid, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if jugdment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 14th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] THOS. AMBROSE,
Clerk of the Circuit Court of the U. S., S. D. O.

(Indorsed:) United States court. No. . Basil F. Warnock vs. George Davis et al. Writ of error. Filed 18 . , clerk.

76 The United States of America, *ss*, to George Davis, William Hughes, Albert McFarland, Jefferson L. Watkins, Edward N. Hope, Melancthon T. Burke, Augustine O. Walker, Felix G. Burke andTrustem M. Lynn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error, filed n the clerk's office of the circuit court of the United States for the isouthern district of Ohio, wherein Basil F. Warnock, administrator of Henry L. Crosser, deceased, plaintiff, and you are defendants in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 16th day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] PHILIP B. SWING,
U. S. District Judge S. D. Ohio,
holding the Circuit Court.

77 (Indorsed:) United States court. No. . Basil F. Warnock, adm'r vs. George Davis et. al. Citation to defendant in error.
Filed 18 . clerk.

Service of the within citation hereby accepted and acknowledged.

W. A. HUTCHINS &
A. C. THOMPSON,
Atty's for D'f'ts in Error.

78 *Assignment of errors.*

Supreme Court of the United States.

BASIL F. WARNOCK, A CITIZEN OF THE STATE of Kentucky, and administrator of the estate of Henry L. Crosser, deceased, plaintiff in error, *vs.* GEORGE DAVIS, WILLIAM HUGHES, ALBERT McFarland, Jefferson L. Watkins, Edward N. Hope, Melancthon T. Burke, Felix G. Burke, Trustem M. Lynn, and Augustine O. Walker, defendants in error.	In Error.

Now comes the said plaintiff in error, by J. B. Foraker, his attorney, and says that in the record and proceedings in said cause there is manifest error, in this, to wit, that by the record aforesaid it appears that the finding and judgment of the court in said cause was in favor of said defendants in error and against said plaintiff in error, whereas upon the law and the evidence of the case judgment ought to have been rendered in favor of plaintiff in error, and against said defendants in error.

79 Wherefore said plaintiff in error prays that said judgment may be reversed, and that he may be restored to all things he has lost by reason thereof.

J. B. FORAKER,
Attorney fo' Plaintiff in Error.

(Indorsed:) Supreme Court of the United States. Basil F. Warnock, adm'r, &c., pl'ff in error, vs. George Davis et al., def'ts in error. Assignment of errors. J. B. Foraker, att'y for P. E.

(Indorsement on cover:) No. 191. Basil F. Warnock, adm'r of Henry L. Crosser, dec'd, plaintiff in error, vs. George Davis, William Hughes, Albert McFarland, Jefferson L. Watkins, Edward N. Hope, Melancthon T. Burke, Augustine O. Walker, Felix G. Burke, and Trustem M. Lynn. S. Ohio C. C. U. S. Filed 19th May, 1879.

OFFICE SUPREME COURT U.S.
FILED
SEP 29 1881
JAMES H. McKENNEY, Clerk.

CINCINNATI LAW BULLETIN PRINT, 362 MAIN ST.

Supreme Court of the United States.

No. 191.

Basil F. Warnock, Administrator of Henry L. Crosser, deceased,
PLAINTIFF IN ERROR.

VS.

George Davis, William Hughes, Albert McFarland, Jefferson L. Watkins, Edward N. Hope, Melancthon T. Burke, Augustine O. Walker, Felix G. Burke and T. M. Lynn,
DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States,
for the Southern District of Ohio.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

OFFICE SUPREME COURT U.S.
FILED
SEP 29 1881
JAMES H. McKENNEY, CLERK.

Cincinnati Law Bulletin Print, 362 Main St.

Supreme Court of the United States.

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DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States,
for the Southern District of Ohio.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

BRIEF.

This action was commenced in the Circuit Court for the Southern District of Ohio.

It was brought to recover the sum of about $5,400, being $4,500, with interest from May, 1874, until July, 1877, when the petition was filed.

It is claimed that this amount is due the plaintiff from the defendants, on account of the collection by them of a policy of insurance upon the life of the intestate, Crosser.

The claim of the plaintiff, more specifically stated, being that Crosser, having a policy of insurance upon his life, for the sum of $5,000, issued to him by the Protection Life Insurance Company of Chicago, Illinois, assigned the same to the defendants with authority to them in legal effect to collect the same, in the event of his death, reimburse themselves for any legitimate expenses incurred on account thereof, and pay over to his estate the balance thereafter remaining.

That the total expense so incurred by defendants was $20.00. That defendants had no insurable interest in Crosser's life, and no claim of any kind against him, except the expense above stated.

The defense, as set forth in defendants answer, is, that, simultaneously with the application by Crosser, for insurance, he entered into a written agreement with defendants, wherein it was stipulated that he should assign his policy, when issued, to them, that he was to make certain small payments to them; and do certain other things, on his part, such as keeping them informed as to his post office address etc., and that in consideration thereof the defendants were to carry his policy *i. e.*, keep it alive, by making all payments, and doing all other things necessary thereunto, and upon the happening of his death they were to collect the money due upon it, and pay to the widow, as ordered by him, one-tenth of the amount thereof, and the other nine-tenths they were to retain as and for their own. That, in pursuance thereof, they expended to keep the policy alive etc., $230,00; collected the whole amount of the policy, viz: $5,000 at his death, which occurred about one year after he was insured; paid the widow $500, less $8.50 dues unpaid by Crosser, which, by his agreement, he should have paid, and that they have rightfully retained the balance.

Upon this state of pleading the case came on to be tried, and a jury being waived, it was submitted to his Honor Judge Swing, sitting as a Circuit Judge, upon the pleading, evidence, (deposition of E. D. Cook,) and arguments of counsel. He found for the defendants, but reserved plaintiff's motion for a new trial to be heard before himself and Judge Baxter, sitting together. They, upon hearing, overruled the motion, and entered judgment for defendants. The case is here upon a petition in error to that judgment.

The error assigned is, that upon the law and the evidence, the findings and judgment of the Circuit Court should have been in favor of the plaintiff in error.

It will be observed that the plaintiff alleges in his petition that defendants expended but $20.00 on account of the policy, and that they were entitled to deduct only that sum from the amount collected by them, and that they were bound to account to him for all the balance, and that they have accounted for only $480.00. As a part of defendants' answer, it is averred that they expended $230.00 on account of the policy, and that they paid to Crosser's widow $491.50, being $500 less $8.50, dues that should have been paid by Crosser, but wich were paid by defendants for him.

But for this part of the defense all the other questions involved in the case might have been raised by demurrer.

This statement is made merely as an explanation why the case should come here as it does.

The merits of the controversy are involved in the legal questions raised by the other defense, viz: that the money sued for belongs to the defendants by virtue of the agreement in that behalf.

We maintain that this defense is not good because against public policy, and rely on 4 *Otto* 460; 15 *Wallace* 643; and other authorities cited in our agreement.

ARGUMENT.

We have accepted as true the statements of the defendants, as made in their amended answer, concerning the insuring of Crosser, and the assignment of his policy to them.

The question presented is then, whether those statements constitute a defense.

It appears from them (notwithstanding a contrary averment) that defendants had no insurable interest in the life of Crosser. He was not indebted to them, and could not be of kin to a partnership.

As to what is an insurable interest in the life of another see

Connecticut Mutual Life Ins. Co. vs. Schaeffer 4 *Otto*, 460.

2. It appears that no fraud was practiced by Crosser, or any one else, on the Insurance Company. It is not claimed that there was anything of the kind.

In the third defense (p. 11 of the record), defendants say, the transaction was entered into between the company, the Trust Association and Crosser in good faith, and with a full knowledge of all the facts &c.

3. The company paid the policy with a full knowledge of all the facts. This is admitted, and shown by the evidence. "See Claimants Statement" page 22 of the record, questions 11, 12 and 13, and the answers thereto: also questions 5 and 7 and their answers, of the deposition of E. D. Cook, page 16 of the record.

4. It appears by his assignment, Crosser authorized defendants to cary his policy for him, to collect it when he died, to reimburse themselves for all monies expended on his account, and pay $500 to his widow, all of which was done, and about none of which do we make any complaint.

5. It also appears that by the terms of the agreement, defendants were to keep all the balance as and for their own, and that they are endeavoring to do so.

I.

Our claim is that Crosser had a right to insure his life. He did so. This policy was valid. It was a contract fairly entered into between him and the company. The company knew all the facts and was satisfied.

Having his policy, he had a right to assign it to defendants to secure anything he might owe them, or anything they might agree to assume and pay for him. He had a right to procure them to cary his policy for him and to assign it to them for their indemnity. They had a right to agree to pay his premiums, and to take an assignment of the policy to secure their reimbursement. Such in part was the transaction in question. So far we do not complain of it, but stand upon it. But while the law allows, and protects such a transaction, it will not, we maintain, allow the assignor of a policy to go further, and by agreement and assignment acquire what has been fitly termed an interest in the death of the assured. Such speculation in life is against public policy.

" A person cannot purchase and hold for his own " benefit, as a matter of mere speculation, a policy of in" surance on the life of one in whom life he has no sort of insurable interest."

Franklin Life Insuranee Co. vs. Hazzard 41, Ind., 116.

" A person who has no interest in another's life can" not purchase or take by assignment an insurance pol-

"icy on such life. Such a thing would be clearly against "public policy, and is not authorized by law."

Missouri Valley Life Ins. Co. v. Sturges, 18 Kansas, 93.

The defense relied upon falls within the language of these authorities. The provisions of the agreement and contract, in so far as they go beyond reimbursement, are clearly invalid and of no effect whatsoever. If the defendants had not been paid the nine tenths of the policy, they could not for an instant maintain an action based upon those provisions to recover it.

This was admitted by counsel and according to our recollection was in harmony with the view of the court below. But counsel contended, and the court held with them, that Crosser was a party to the illegal part of the agreement and that the maxim "*In pari delicto &c.*" was applicable, and hence the law would leave the plaintiff, who stood in Crosser's shoes, where it found him, and upon that ground gave the judgment of which we complain.

We confidently claim that this was error. The court, as we think, fell into the error through a disregard of the well settled rule, respecting the doctrine of "*in pari delicto* &c.," "that when a demand connected with an illegal transaction can be sued on without the necessity of having recourse to the illegal transaction, the plaintiff may maintain his action."

Brooms Legal Maxims star page 699.

And Mr Pollock says in his work on Contracts, p. 328.

"The test for the application of the rule is whether "the plaintiff can make out his case otherwise than through "the medium and by the aid of an illegal transaction to "which he was himself a party."

There is no dissent from the rule as laid down by those authorities, hence we deem it unnecessary to multiply citations.

Such being the rule, how can it be said that there is anything in the maxim respecting *par delictum* that prevents our recovery.

Our action is not founded upon anything that is illegal or against public policy. We are not bringing forward anything of the sort. We are suing for money had and reciveed. That money did not arise from anything that was illegal or against public policy. It is the proceeds of a policy of insurance that Crosser had a right to procure, and which he had a right toassign for the purpose of enabling him to obtain help in carrying it. He had a right to authorize defendants to collect his policy when he died.

There was nothing in all that, that was illegal; but that is all we need show to recover. What we ask for did not come out of anything wrong. The only invalid feature of the whole transaction was the efforts of defendants to acquire a greater interest in the policy than the law will allow. That part of the transaction was invalid, because against public policy, but our action is not founded on that part of it, but is in disregard of it. We are not claiming through that medium, but ignoring it. The fund in controversy did not arise in consequence of the agreement, but wholly indpendent of it. We are not resting on the *delictum.*

II.

But manifestly the maxim *in pari delicto, etc.,* has no application to this case for the reason, as stated by this Court in *Cammack vs. Lewis,* 15 Wallace, 643, that the wagering and gambling element of the contract was wholly *on the part of the defendants.* The thing reprehensible in the eye ot the law; that which the law aims to prevent, being just that thing which the defendants did, when, by the transaction in question, they placed themselves in a position to derive large pecuniary benefit from the death of Crosser, *provided it came early*; a benefit that was to decrease each year that Crosser lived, and, as counsel at the trial endeavored to show, fade away entirely, if he lived out his "natural expectation," which fact necessarily suggests the thought, which shows the great evil of this whole business, that, "defendants having gone into this transaction to make money, "as counsel there said, and knowing that if Crosser lived out his "natural expectation," there was no money in it for them, must have expected, to say nothing about their intentions, that Crosser would not live out his "natural expectation." And this thing which defendants thus did, and which is *the* thing condemned by the law, is the very last thing that Crosser ever thought of being a party to. But even if he were a party to the *delictum*; what of it? Who these parties were, is shown by the record. To say that this organized Trust Association, an adjunct of this Chicago Insurance Co., and Crosser, the humble applicant for insurance, were standing upon an equality, and equally at fault when they executed the papers in question is simply to ignore common sense and shut our eyes to a record full of contradictory facts and circumstances.

III.

We think the exact case here presented, (except that our case is much stronger,) has been decided already by this court *in Cammack vs. Lewis,* 15 Wallace, 643.

There, Lewis owed Cammack $70, and to that extent Cammack had an insurable interest in Lewis.

Here, nothing was owing, and no insurable interest of any kind.

There, Lewis gave his note to Cammack for $3,000, which was without consideration, "and," say the court, "could only have been intended for some purpose of de-"ception; probably to impose on the insurance company."

Here, Crosser did nothing to deceive or impose on anybody.

The court will see what the other facts were, and that there was some disagreement about them.

But we call attention to what Cammack claimed the facts to be. (*See page* 647), viz. :

"That the policy was taken out under an agreement between Lewis and himself that he should pay the premiums for the seven years the policy was to run, and in consideration of those payments, *and what Lewis owed him,* he should, in the event of Lewis' death, during the life of the policy receive," (not *nine-tenths*), "but two-thirds of the policy, and pay over the other third to Lewis' wife or his heirs."

The court say—

"If the transaction, *as set up by Cammack,* be true, "then so far as *he* was concerned," (*not both of them,*) "it "was a sheer wagering policy, and probably a fraud on "the insurance company.

"To procure a policy for $3000, to cover a debt of "$70.00, is of itself a mere wager," (How then as to a "policy for $5000.00 to secure nothing?)

"The disproportion between the real interest of the "creditor and the amount to be received by him deprives "it of all pretense to be a *bona fide* effort to secure the "debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get $2000.00 "out of the $3000.00, nor is it weakened by the fact that "the policy was taken out in the name of Lewis and assigned by him to Cammack."

* * * * * *

"Under *these circumstances,* we think that Cammack "could, in equity and good conscience, only hold the policy "as security for what Lewis owed him when it was "assigned, and such advances as he might afterwards "make on account of it, and that the assignment of the policy to him was only valid to that extent."

We submit that "these circumstances," as above set forth by the court, as the foundation for its decision, were far more favorable for Cammack, than are the circumstances and facts of this case, to the defendants herein.

Especially must it be admitted that the administrator of Crosser, as the plaintiff in this case, stands before the court in a much better light than did the administratrix of Lewis, when we remember that it is not claimed by any one, that Crosser, at any time, did anything to deceive or defraud any one; that, on the contrary, defendants themselves claim that his action was just the reverse; while, as to Lewis, the court held that while the $3000.00 note had probably been given by him for a fraudulent purpose yet.

"At all events, we do not see such evidence on his "part of a corrupt transaction, as to forbid the Court "from doing justice between his administratrix and Cam- "mack, after the amount secured by the policy has been "paid by the Company to the latter."

IV.

Defendants urged below that if we had any remedy at all it was in equity, and cited the fact that *Lewis* vs. *Cammack* was a suit in equity.

The case of *Lewis* vs. *Cammack,* was in equity, but we think it manifest from the facts of the case stated why it was so.

Cammack held the note of Lewis for $3,000.00 "without consideration and intended as a fraud on the Insurance Company, etc."

Mrs. Lewis, the plaintiff in that case, before her appointment as administratrix, had received the $1,000 in full settlement and satisfaction. There had been some dealings between Lewis and Cammack.

With such a state of facts surrounding the case, it is not to be wondered that it was thought best, in entering upon a litigation, in which all those facts and others would be developed, to invoke the jurisdiction of a Court empowered to order an account, and to cancel and require to be delivered up, such documents as we have referred to.

But in this case no such papers exist. There is no need for an account. There is nothing to be cancelled.

We have but the simplest case of money had and received, for which the action at law, which we have brought, is the only proper action.

On this point we refer the Court to the case of *Clark vs. Allen,* Insurance Law Journal, for May, 1877, p. 355 decided by the Supreme Court of Rhode Island.// 11 R. I.

In that case, a policy had been taken out in good faith, and carried for a number of years, until, being unable to keep up the insurance, the assured sold and assigned his policy to his brother-in-law, for the sum of $125.00, the then surrender value of the policy being but $118.00.

The assignee afterward paid premiums on the policy to the amount of $125.00.

The assured having died, the assignee collected on the policy $2,120.20.

The administrator of the assured brought suit against the assignee to recover the amount received by him on the policy, less the amount paid by him on account of it, *and the action was assumpsit for money had and received.*

No one seems to have even suggested that the proceeding should have been in equity.

The plaintiff was not allowed to recover, but solely on the ground that the sale and assignment was an honest and *bona fide* business transaction, and *not intended as a contrivance to circumvent the law;* thus clearly intimating that had it not been an honest business transaction, but intended as a contrivance to defeat the law, a recovery would have been granted.

Recognizing the fact that the decision they were making, was, to some extent, in conflict with the decisions of other States, and the Supreme Court of the United States on the subject, the Court expressly state, endeavoring to harmonize themselves, that *perhaps* the case of *Cammock* vs. *Lewis*, was a case where the parties designed to circumvent or evade the law. (*See page* 357.)

"The truth is," says the Court, "it is one thing to "say that a man may take insurance upon the life of "another, for no purpose, except as a speculation or bet "on his chance of life, and may repeat the act *ad libitum*, "and quite another thing to say that he may purchase "the policy as a matter of business, etc. (*See p:* 358.)"

The Court will observe also that in *Clark* vs. *Allen*, it was contended by the plaintiff, that if the assignment was absolute, it was void, as against public policy, and that he was therefore entitled to recover the money received on it, less the payments made by the assignee on account of the policy.

The Court will also observe, that it did not occur to the defendant to make, or the Court to suggest the defense, in answer, that, if so, the plaintiff was in fault, and for that reason could not recover.

V.

So far as the payment by the defendants to Mrs. Crosser is concerned, and the effect of it, that, too, is considered in *Cammock* vs. *Lewis*.

Mrs. Crosser, when she received that payment, received it not as administratrix, which she never was, but as an individual.—She had no right to represent, or act for, or bind her husband's estate, and did not attempt to do so. As to that payment the most defendants can claim is, that they should have credit for it, and that we have given them.—All that is asked is, that, after allowing the defendants all that may be necessary to make them *entirely whole,* both principal and interest, we may have judgment for the remainder.

Respectfully submitted,

J. B. Foraker,

Attorney for Plaintiff in Error.

Sept. 21, 1881.

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SUPREME COURT OF THE UNITED STATES.

No. 191.

Basil S. Warnock, Administrator of Henry L. Crosser, Deceased,
Plaintiff in Error,
vs.
George Davis, William Hughes, Albert McFarland, Jefferson L. Watkins, Edward N. Hope, Melancthon T. Burke, Augustus O. Walker, Felix G. Burke, and T. M. Lynn,
Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

BRIEF.

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BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

BRIEF.

It is alleged in the answer of the defendants, and not denied by the plaintiff, that Crosser, the plaintiff's intestate, being desirous of procuring insurance on his life, and not being able to bear the expense thereof, on the 27th day of February, 1872, applied to the Scioto Trust Association (under which name the defendants were doing business) to procure such insurance for him, and as the result of this application the agreement set forth in the amended answer of the defendants was entered into. That agreement, shortly stated, was this: Crosser agreed to procure a policy of insurance on his life for five thousand dollars, and assign nine-tenths of it to the defendants, in consideration that they would keep it up at their own expense, and at his death collect and pay over to his wife one-tenth of the proceeds thereof. In pursuance of this agreement Crosser afterwards, but on the same day, applied for and procured the policy of insurance mentioned in plaintiff's petition, and on the next day assigned nine-tenths thereof to said Association.

The policy was issued by the Insurance Company with full knowledge of the agreement between Crosser and the defendants, and the defendants during the lifetime of Crosser paid the Insurance Company all dues and assessments on account of said policy.

Crosser died on the 11th day of September, 1873, and on the 16th day of May, 1874, the insurance company paid the association five thousand dollars, in satisfaction of said policy. Afterwards, on the 23d day of May, 1874, the association paid Crosser's wife four hundred and ninety-one dollars and fifty cents, in full satisfaction of her one-tenth interest in said policy—that amount being one-tenth of the proceeds of said policy, less eight dollars and fifty cents due from Crosser to the association for dues, &c.

These facts, as above stated, are either admitted in the pleadings or shown by the evidence, and are not controverted.

Upon this state of fact the plaintiff, as the administrator of Crosser's estate, brought suit against the defendants, in the Circuit Court for the Southern District of Ohio, to recover the sum of forty-five hundred dollars, as the balance of the proceeds of said policy of insurance remaining in their hands.

The claim of the plaintiff is; That the moneys realized by the defendants on this policy of insurance were had and received to and for his use.

It is not claimed by the plaintiff in pleading, nor is it attempted to be shown in evidence that Crosser was induced by fraud, misrepresentation, or undue influence to assign his policy to the defendants, nor that in the transaction with the defendants he was in any way over-reached, cheated, or defrauded, but it is claimed in argument that the transactions between, Crosser, the insurance company and the defendants was illegal, because against public policy, and that therefore the proceeds of said insurance policy belong to plaintiff, and are held by defendants for his use.

As against the position of plaintiff we affirm and will argue the following propositions, to wit:

First. There is no error assigned which the court can notice.

Second. The transaction was not against public policy and was not illegal.

Third. The transaction, if illegal, was void only as to the insurance company.

Fourth. If the transaction was illegal the plaintiff's intestate was a party to it, in equal fault with defendants, and the maxim, "*In pari delicto melior est defendentis,*" applies.

Fifth. The facts and circumstances in the case do not show that the defendants have money which in equity and good conscience they should pay over to the plaintiff, but show the contrary.

ARGUMENT.

AS TO THE FIRST PROPOSITION.

The error assigned is "that the finding and judgment of the court in said cause was in favor of said defendants in error and against said plaintiff in error, whereas upon the law and the evidence of the case judgment ought to have been rendered in favor of plaintiff in error, and against said defendants in error."

The case was tried in the court below, without the intervention of a jury, under a stipulation in writing waiving a jury, as provided by statute. But there was no special finding of the facts upon which this court can be asked to determine the sufficiency of the facts to support the judgment. And no rulings of the court in the progress of the trial, or other questions of law, are presented by the bill of exceptions. The bill of exceptions only purports to set forth the evidence in the case. And no question of the sufficiency of the pleadings has been presented by demurrer or motion for an arrest of judgment.

Norris vs. Jackson, 9 Wall, p. 125.

The overruling of the motion for a new trial was a matter within the discretion of the court below, and can not be assigned for error here.

Indianapolis and St. Louis Railroad Co. vs. Horst, 93 U. S., p. 291.

AS TO THE SECOND PROPOSITION.

Counsel for plaintiff seem to argue that the agreement between Crosser and the defendants, and the assignment made in pursuance thereof were illegal, but that the policy of insurance itself was valid and free from all taint, and he repudiates the agreement and assignment and plants himself on the policy. But the agreement, the taking out of the policy and the assignment were only parts of one transaction, and the parties thereto were not only Crosser and the defendants, but the insurance company also. The company issued the policy with full knowledge of the agreement between Crosser and the defendants, and knew that it was to be owned by them in the proportions stipulated in the agreement. If the agreement and assignment were illegal, as claimed by plaintiff's council, for want of an insurable interest on the part of the defendants in Crosser's life, then for the same reason the policy was invalid, because they were parts of one transaction. The doctrine of plaintiff's counsel would defeat, not promote, public policy in such cases. It might have enabled plaintiff to recover on the policy against the insurance company notwithstanding nine-tenths of it was really taken out for the benefit of persons having no insurable interest in the life of the assured. The contrary of this has been decided by the Chancery Division of the High Court of Justice in England in the case of Worthington vs. Curtis 1 Ch. D., p. 419, Moak's Rep., p. 836.

Again, the assignment of the policy to the defendants was not made, as suggested by counsel for plaintiff, by way of indemnity, in whole or in part, to secure defendants for advances towards premium, but was an *absolute* assignment of nine-tenths of the policy in consideration of the terms and stipulations of the agreement, in pursuance of which the policy was taken out. It is expressly stated to be "in consideration of the terms and stipulations" of that agreement. Counsel must not manufacture an assignment to suit the exigencies of his case, but must be content to stand upon the one made by the parties.

Now this assignment and the agreement in pursuance of which it was made, whatever they may be in contemplation of law, were, as a matter of fact, made in good faith by Crosser and the defendants, with the full knowledge and acquiescence of the insurance company. It is so alleged in the amended answer of the defendants, and is not denied by plaintiff, but is admitted by plaintiff's counsel in argument. (See pages 4 and 5 of brief for plaintiff.)

And the agreement has been fully performed and executed by defendants, without objection from the insurance company, without objection from Crosser in his lifetime, and without objection from Crosser's wife, the beneficiary of his interest in the policy. The objection comes from the administrator of Crosser, and it does not appear in whose interest he is moving, whether that of creditors, or of the distributees of the estate.

The transaction was not in contravention of any statute, and was not necessarily wrong in itself. It is not impossible to conceive of a poor man, desirous of making provision for his family by insurance on his life, seeking the assistance and making the arrangement that Crosser made with the defendants, and of its being done in perfect good faith by both parties. He was a man of twenty-seven years of age, in good health, and could reasonably expect to live twenty-five or thirty years. But death might come sooner, and, in order to provide against that calamity, he wanted to insure his life, but was too poor to bear the expense of insurance. He thereupon applied to the defendants for assistance, and an arrangement was made with them which secured to his wife, without any expense to him, five hundred dollars, less two dollars and a half for each year he should live—not less than four hundred dollars, even if he should live thirty years. On the other hand, the defendants assumed an obligation fully commensurate with the benefits to be derived by them, as the plan of the insurance will show. They bore all expenses and assumed all risks. Crosser alone had a certainty. In this there was nothing, so far as Crosser was concerned, unconscionable or unfair. He has been fairly and honestly dealt with—dealt with according to his contract, and his wife having received all that was stipulated for, or expected, the transaction should now stand, unless public policy requires that it should be disturbed.

If, then, as must be conceded under the pleadings in the case, the transaction, as a matter of fact, was entered into by the parties in good faith, with honest intentions towards each other, and without any intention to cheat or defraud the insurance company, can the court, as a matter of law, say that the transaction is illegal? If so, upon what ground? Can it be said, as a matter of law, without reference to what the parties, as a matter of fact intended, that, in its nature, necessarily it was a mere gambling speculation?

We think not. Its character is to be determined by the intention of the parties, and that intention is a question of fact for the jury.

This we understand to be the doctrine of this court, in the case of Ætna Life Insurance Company v. France, 94 U. S. R., p. 561, where the court say: "The contract of insurance, as correctly construed by the court, was made with Chew; and the relationship of the parties was such as to divest the assignment of the policy or the direction of its payment to his sister of all semblance of a wagering transaction. Under these circumstances, it matters not if the money or notes required for paying the premium did come from Mrs. France; at most, it was by way of advance on her brother's account, and on his contract. He had a right to take out a policy on his own life for his sister's benefit; and she had a right to advance him the necessary means to do so. As between *strangers*, or persons not thus nearly connected, such a transaction would be evidence to *go to the jury*, from which, according to the circumstances of the case, they might, or *might not*, infer that it was mere gambling."

Crosser had an interest in his own life and the policy was valid at its inception, and if the parties acted in good faith the want of an insurable interest in Crosser's life, on the part of the defendants, would not invalidate the assignment to them of nine-tenths of the policy. This court in the case of Connecticut Mutual Life Insurance Company v. Schæfer, 94 U. S. R., p. 460, says: "And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or *friend;* on two or more persons on their joint lives, for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question."

"The *essential* thing is, that the policy shall be obtained in *good faith,* and not for the purpose of speculating upon the hazard of a life in which the insured has no interest."

Now that they did act in good faith is, we claim, admitted in the pleadings, and at any rate as a question of fact for the jury, in the court below, can not, under the finding of the court below, be raised here.

AS TO THE THIRD PROPOSITION.

The case of Worthington v. Curtis, cited above, was as follows:

A father effected a policy in the name and on the life of his son, in which he had no insurable interest, under circumstances which satisfied the court that he intended it for his own benefit. The son died intestate and the father took out administration to his estate, and the insurance company paid the money assured by the policy to him. Held (affirming the decision of Bacon, V. C.,) that although as between the insurer and the company the policy was illegal and void under the 14 Geo. 3, c. 48, yet, as between the father and the estate of the son, the father was entitled to retain the money for his own benefit.

The statute of 14 Geo. 3, c. 48, referred to, enacts "that no insurance shall be made by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaining or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

The court in deciding the case says: "Then the son dies, and the money becomes payable on the policy. Assuming that a creditor, instead of the father, had taken out administration, could he have maintained an action of detinuea gainst the father for the policy? Certainly not. He would have been in the same position as the son before his death, and the son having no property in the policy his administrator would have had no right to it either. Then, supposing the company chooses voluntarily, and without taking advantage of the statute, to pay the money to the father—I say voluntarily, because *neither party* could have maintained an action against the company—could the administrator of the son have recovered the money from the father? Certainly not. In my opinion, therefore, there are two reasons for which the appeal must fail. First, because the statute is a defense for the insurance company *only*, if they choose to avail themselves of it. If they do not, the question who is entitled to the money must be determined as if the statute did not exist. The contract is only made *void* as between the *company and the insurer*. And, Secondly, if that is not so, and if the effect of the statute is that the court will give no relief to any party because of the illegality of the transaction, in that case the maxim, *melior est conditio possidentis*, must prevail, and the party who has the money must keep it. On both these grounds, but especially on the first, I think the conclusion of the Vice-Chancellor was right and this appeal must be dismissed with costs."

If the transaction in the case at bar was objectionable as against public policy, it invalidated the insurance only. It could not affect the rights of Crosser and the defendants in case the insurance company voluntarily paid the money over on the policy, as it did do, without making any question as to the legality of the insurance.

This is not a suit on the policy against the company, but to recover moneys, which plaintiff in his petition alleges were received by defendants "as the assignees of said policy under said assignment," and falls within the reason of the case of

Brooks vs. Martin, 2 Wall., p. 70.
See also Pollock Contracts, p. 329.
And Lindley Partnerships, p. 160.

AS TO THE FOURTH PROPOSITION.

Counsel for plaintiff says his action is not founded upon the agreement or assignment set up by defendants, but in disregard of them; that the defendants received the moneys on the policy; that the policy was valid and Crosser owned it; that he only sues for the proceeds of his own policy and that he can make out his case without recourse to the agreement and assignment. This is simply assumption.

As we have already argued the agreement, policy and assignment were simply parts of one entire transaction, and the only thing affected by the illegality of the transaction, if illegality existed, was the insurance itself. But can he make out his case without recourse to the agreement and assignment? He alleges in his petition that Crosser assigned the policy to defendants in trust; that the defendants collected the moneys under the assignment; and that they refuse to account and pay over &c. Now is it not absolutely necessary to his case to show the true character of the assignment?

Take the case cited in Pollock's Contracts, p. 328; where plaintiff had deposited half the of a bank note with the defendant by way of pledge to secure the repayment of money due for wines and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant for the purpose of being consumed there in a debauch, and for money lent for similar purposes, it was held that the plaintiff could not recover, as it was necessary to his case to show the true character of the deposit. This is apparent by the course of the pleadings: the declaration was on a bailment of the half note to be redelivered on request, and in detinue. Pleas, in effect, that it was deposited by way of a pledge to secure moneys due. Replication, the immoral character of the debt as above.

Now, in the case at bar, plaintiff alleges that the defendants got the money under the assignment of the policy in trust. We deny that and say the assignment was absolute as to nine-tenths of the policy upon the considerations mentioned in the agreement. Plaintiff then says that the agreement and assignment were illegal; and we then say you were a party to them and cannot complain.

It is admitted that Crosser applied to the defendants;

that he was the first mover in the transaction; and that he entered into the agreement set out in the pleadings with full knowledge of all the facts, and that no advantage was in any way taken of him, nor was he in any way deceived or defrauded. The transaction itself shows that he understood the nature of the agreement he was entering into. Necessarily, he understood that he was to have but one-tenth, and the defendants nine-tenths of the policy; that the defendants were to bear all the expense of the same, and that he was to be at no expense; that he did not owe defendants anything, and that they were in no way related to him nor to his family. As a matter of law, we have a right to presume that he was a man of ordinary sense and capacity, and if he was, he necessarily knew these things. And yet he not only voluntarily entered into the agreement, but was the first mover in bringing it about. If the transaction was illegal, Crosser was certainly in equal fault with the defendants.

The contract having been executed, must stand. The rule is: "Wherever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them; if the agreement be executed the court will not rescind it; if executory, the court will not aid its execution."

AS TO THE FIFTH PROPOSITION.

Can the plaintiff say that the money sued for in equity and good conscience belongs to the estate of Crosser?

In order to maintain money had and recovered, either the money or goods, for which the plaintiff claims the proceeds, must originally, or at the time of the action brought, have *belonged to the plaintiff.* Chitty's Plead., vol. 1, p. 387.

Did these moneys ever belong to Crosser? If the contract between Crosser and defendants is one that ought to be sustained, then of course the moneys sued for never belonged to Crosser. If that contract is illegal then what are the circumstances of this case, from which the law will imply the promise, against defendants, necessary to sustain the action. The action is founded in contract, and the doctrine of an equivalent for the promise lies at the foundation of all contracts. It is because the party claiming has done or suffered something which the law deems an equivalent for the moneys, that the law implies a promise on the part of the party holding the same, to pay them over. There must be a *consideration* for the promise which the law implies. If there is nothing in the transaction to entitle the one party more than the other to the moneys, there can be no promise implied in law as against either to pay the other. Now what equivalent did Crosser give for the promise which plaintiff asks the law to imply against the defendants. He paid nothing towards the policy, and sustained no loss in any way. Defendants have received no money or thing of value from Crosser. The only thing he gave to the enterprise was his name, and that brought him under no liability. Defendants have borne all the expenses. They paid all the assessments on the policy to the insurance company, and the insurance company voluntarily placed these moneys in their hands. Now if you go outside of the express contract between the parties and look to the circumstances of the case to raise a promise in favor of plaintiff, you find all the circumstances against him.

Crosser entered into an illegal transaction with defendants to obtain life insurance, part of the proceeds of which he agreed to give defendants for procuring and keeping up the insurance, and plaintiff having received Crosser's share of the moneys realized out of the transaction, now sets up its illegality as a circumstance from which in law to imply a promise of defendants to pay him their share also.

The plaintiff seems to have founded his action on the case of Cammack v. Lewis, reported in 15 Wallace, page 643. An examination of that case, however, will show that there was no real similarity between them. That was a bill in equity for relief against Cammack for abuse of confidence and overreaching; this is an action of law for money had and received. There, as Lewis claimed, and as the court found, the policy was assigned as security for a pre-existing debt, and for advances to be made on the premium, and that as soon as the debt was paid and the advances returned, the policy was to be restored to Lewis; here the policy was not assigned as a security at all, but nine-tenths of it was assigned absolutely, in consideration that the defendants would keep it up at their own exclusive expense, and at Crosser's death collect and pay his one-tenth of the proceeds thereof to his wife. There, Lewis "looked upon Cammack as a friend, to whom he was willing to trust the policy assigned," and "never supposed more would be claimed by Cammack than what he owed him;" here Crosser was dealing in a purely business way with an Association of persons, to whom he did not owe one cent, and to whom he did not expect to owe anything. There, the agreement between the parties for the disposition of the proceeds of the policy after Lewis' death, was made three months after the issuing and assignment of the policy was issued, and was signed by Cammach only; here the agreement was made before the policy was issued and was signed by both parties. There, the policy was for seven years only, and Lewis believed he would survive it, and for that reason might, and probably did, the more readily accede to Cammack's terms; here, the policy was for life, and Crosser could have no such belief. And, in short, the evidence in the Cammack case, intrinsic and extrinsic, shows abuse of confidence, overreaching and unfair dealing; while here it is conceded that Crosser entered into the agreement with the defendants with full knowledge of all the facts, and that no advantage was in any way taken of him, nor was he in any way deceived or defrauded, and that during his life he stood by while defendants were paying the assessments upon the policy, and with full knowledge consented to all that they did.

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